San Francisco
Law Library

426 CITY HALL

No. 19v10v

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

No. 21,523

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Respondent.

Opening Brief for Intervenor and Charging Party, Reynolds Electrical & Engineering Co., Inc.

WILLIAM F. SPALDING,
STEPHEN E. TALLENT,
JACK H. HALGREN,
GIBSON, DUNN & CRUTCHER,
634 South Spring Street,
Los Angeles, Calif. 90014,
Attorneys for Reynolds Electrical & Engineering Co., Inc., Charging Party and Intervenor.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases Page

Statutes

No. 21,523

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Respondent.

Opening Brief for Intervenor and Charging Party, Reynolds Electrical & Engineering Co., Inc.

Statement of the Case.

This is a Petition for Enforcement of an Order issued by Petitioner, National Labor Relations Board, against Respondent Labor Organization. The Board below adopted the decision of a Trial Examiner which found that Respondent had engaged in activity violative of Sec. 8(b)(4)(i)(ii)(D) of the Act, 29 U.S.C. Sec. 158(B) in that it had induced employees to engage in concerted refusal to perform services and a strike and had threatened and coerced the Charging Party for the object in both cases of forcing the Charging Party to assign particular work to employees represented by Respondent Union rather than to employees

represented by the International Brotherhood of Electrical Workers, Local 357 (Hereafter "Electricians").

Upon the initial filing of the Charge and Amended Charge the Board caused a Notice of Hearing under Section 10(k) of the Act, 29 U.S.C. Sec. 160(k) to be issued. Following such Hearing the Board made a determination of the work assignment dispute giving rise to the Charge. It found that this Intervenor had previously assigned the disputed work to Electricians and that Respondent and employees it represented had no jurisdiction or right to perform such work. Respondent failed to accept said determination whereupon in accordance with the usual procedure an unfair labor practice complaint was issued. On Hearing under that complaint the parties stipulated to the use of the record made in the Section 10(k) Hearing plus stipulations and additional exhibits entered in such unfair labor practice Hearing. Upon the failure of Respondent to comply with the Cease and Desist Order thereafter issued by the Board, the Board caused this Petition for Enforcement of Order to be filed.

Jurisdiction of Court.

This Intervenor, the Charging Party, is the general contractor for construction and support services for the Atomic Energy Commission at its Nevada Test Site. As such it is activity engaged in commerce within the meaning of the National Labor Relations Act (hereafter the "Act"). All parties concede the jurisdiction of the Board. The jurisdiction of the Court to enforce the Board's Order is predicated on Section 10 of the Act, 29 U.S.C., Section 160.

Statement of Facts.

The following is a partial statement of relevant facts.

At various times since 1951 the Atomic Energy Commission has conducted nuclear testing at the Nevada Test Site. This site consists of something in excess of 1,500 square miles and is sometimes referred to as "Mercury". Actually, Mercury is the townsite which is the entrance to the test site from Las Vegas and constitutes the on-site headquarters for the operations of this Company, as well as other agencies and contractors on the test site. The Charging Party, Intervenor Reynolds Electrical & Engineering Co., Inc., (hereinafter "REECO") has been the prime contractor for this AEC work on the Nevada Test Site since December, 1952 [Tr. 1882]. As prime contractor it has performed various types of construction, support and service work in connection with testing going on under the direction of the AEC.

From 1951 until October, 1958, testing at the site was essentially all atmospheric tests. On October 30, 1958, the President declared a unilateral moratorium of all further nuclear testing and this continued until September 6, 1961, at which time the President terminated it [Tr. 570, 441]. Since the end of the moratorium, September 6, 1961, all testing at the test site has been underground, either in tunnels or well holes.

As is shown on Examiner's Exhibit 5, the test site map, the site consists of various numbered areas which have been so established for administrative purposes. The AEC work is performed through various scientific laboratories and agencies and the work of one such agency will normally differ to some extent from the

work of another agency. Each such agency has a certain portion of the test site designated for experimental work under its supervision. For example, the Lawrence Radiation Laboratory's experimental work is principally performed in Areas 9, 2 and 10, while the testing supervised by Los Alamos Scientific Laboratory is principally performed in Areas 3, 1 and 7 [Tr. 345].

In the performance of its construction and support work in the forward areas for these agencies, REECO has employed construction craftsmen working under labor agreements with essentially all of the various construction trades. To facilitate its work in each testing area of the site there have always been and are now "compounds" or "staging areas" for most operating administrative areas. In this staging area or forward area compound, the area superintendent and each of the craft superintendents have trailers for their offices [Tr. 343-349].

In all of these various compounds in addition to the superintendent's trailer offices there are shop and construction facilities for each or most of the various building trades. These areas are sometimes fenced and sometimes unfenced and are generally referred to as the compound for each particular craft [Tr. 349-351, 353; 848-850]. Also, the entire staging area is generally referred to as a compound, including therein the respective compounds and shops of most crafts [Tr. 343].

Surrounding the compound for each administrative area such as areas 9 and 3 are a number of points at which materials fabricated by the crafts in their construction compound are put to actual testing use. In the case of these areas these points consist of well holes at which a test will be conducted [Tr. 871, 357].

For example, in Area 3 there are about twenty-five such holes at which operations presently exist [Tr. 356]. For each well hole REECO builds several structures to be used in connection with the test. These structures are initially built in the compound by the various craftsmen and then transported to the well hole involved for installation [Tr. 408-409, 414, 869].

For the construction and support services in each of the administrative areas REECO has materials delivered to the various forward compounds upon requisition by construction personnel [Tr. 359-360]. Most of these materials are taken from one of the five warehouses operated on the test site by REECO. These five warehouses, recognized as such, are covered by the Teamsters' contract, Teamster Exhibit 5, and completely staffed and operated by teamster-represented personnel [Tr. 901-908; 935-936]. No dispute exists as to any of such five recognized warehouse locations.

Materials taken from the teamster-operated warehouses are delivered on REECO trucks driven by teamster drivers and are unloaded at the compound of each particular craft involved. The unloading at the compound has never been by teamsters. It has always been unloaded by hand by the craft involved, sometimes by or with the assistance of laborers, and if by forklift by operating engineers [Tr. 360-363; 865]. Essentially all of the materials so delivered to the craft compounds are to some extent there fabricated and constructed and this is the reason they are so delivered [Tr. 360-362; 408]. It has been found more efficient and economical to have these materials fabricated and constructed in the compound, where more or less permanent shop locations and supporting facilities are avail-

able, than at the various holes [Tr. 515, 409]. As materials are fabricated and are made ready for installation at the well hole location, they are loaded into trucks in the compounds by the particular craft who fabricated them, sometimes with the assistance of or by laborers, and these will be loaded by operating engineers if forklift is required [Tr. 865, 420]. The great preponderance of testimony demonstrates that throughout the history of the test site the operation of trucks hauling electrical materials and/or crews in the forward areas, and particularly between compound and points of use as well as from one point of use to another within the same administrative area, has been by electricians to the exclusion of teamsters [Tr. 342, 420, 436-437, 562, 585, 836, 888, 833-834, 839-840, 2431-2432, 2412; 2490-2491, 2492-2493, 2494, 2497, 2499; 2532-2533, 2534, 2537, 2538, 2540, 2541, 1135-1137, 1140, 1141].

No teamster warehouse personnel (as distinct from drivers) are now or ever have been employed in any of the forward area compounds or staging areas [Tr. 874, 446].

In short, the dispute giving rise to this proceeding, was a demand by the teamsters that all of these various forward compounds constitute "warehouses" within the meaning of their (teamsters') contract because materials were there set off to be used either then or at some time in the future, and that this constitutes the "warehousing" of materials. If this were conceded (the teamsters argued), then the unloading, counting, sign-

ing delivery tickets, storing, placing and loading out would become the work of the teamsters to the exclusion of the other crafts who had performed it.

In addition to this jurisdictional claim there was a further contention against electricians consisting of the operation of vehicles transporting materials from the various electrical compounds to one or more of the points of use which that cmmpound services, that is, the surrounding well holes.

To enforce their claims the teamsters engaged in a variety of concerted actions ranging from threats and refusing to deliver materials from an acknowledged teamster operated warehouse to craft compounds, to a general strike and picketing. This conduct is set forth in the Trial Examiner's Decision [R. 23, line 40, R. 28, line 30]. It need not be further considered since the Respondent Union did not except to these findings of fact to the Board below, nor are they challenged here. The fact that the Respondent engaged in concerted activity and threats thereof to support their work claims is not an issue before this Court.

REECO initiated proceedings below by filing the Charge and amended Charge [R. 3-6] alleging the Respondent to be in violation of Section 8(b)(4)(i)(ii)-(D) of the Act. (29 U.S.C. 158(b)). There followed a hearing under section 10(k) of the Act (29 U.S.C. 168(k)) and the Board's determination that the disputed work had been properly assigned by REECO to

the electricians, and that the Respondent or employees it represented had no right to perform such work.

The Respondent refused to accept such determination. The General Counsel of the Board issued an unfair labor practice complaint [R. 7 *et seq.*] to which Respondent answered [R. 12 *et seq.*].

There followed hearing and decision by a Trial Examiner [R. 17 *et seq.*] which decision the Board adopted *in toto* [R. 57 *et seq.*].

Questions Presented.

In its answer to the complaint [R. 12] as well as its answer to the Petition before this Court [R. 61 *et seq.*] Respondents raise no question of adequacy of evidence to support findings; they present only the questions:

(1) Was the Board authorized to process and resolve the dispute where Respondents' claim is based on alleged contractual commitments conceding to it the disputed work tasks; or, was the Board required to stay its action pending litigation of such contractual assertions in the District Court?

(2) Is the Board precluded from prosecuting unfair labor practices occurring after the filing of the charge?

(3) Was the Board justified, in issuing a "Broad Form" Cease and Desist Order?

ARGUMENT.

The authority of the Board under Section 10(k) of the Act to determine the propriety of work assignments which are the subject of a jurisdictional dispute between two or more labor organizations cannot be questioned. The fact that contractual claims may be to some degree a basis for the claim of one or more unions is a typical circumstance. The Board is constitutionally empowered by the Act in the resolution of such jurisdictional disputes to deal with such contractual claims. Respondent's argument that the presence of contract claims precludes the Board's exercise of its jurisdiction is without merit and of course assumes the very question involved here.

The Charge and Amended Charge filed by this Intervenor set in motion the Board's jurisdiction. The Board was therefore empowered to allege in its complaint any conduct constituting an unfair labor practice and within the general description of the Charge even though such conduct may have occurred or continued subsequent to the filing of the Charge.

In the context and circumstances of this case in which Respondent engaged in massive, extreme and irresponsible concerted conduct the Board's decision to issue a "Broad Form" Order is justified.

I.

The Board's Jurisdiction to Prevent Unfair Labor Practices Is Not Preempted by Alleged Contract Claims or the Pendency of Judicial Proceedings Involving Such Claims.

At the time of the dispute in question, REECO was party to written collective bargaining agreements with the Electricians' Union [I BEW Ex. 4] and Respondent, [Teamsters Ex. 5]. Both unions at the time of the dispute claimed the work, in part based upon the terms of their respective contracts with REECO In addition a part of the Teamsters' claim was the so-called Carter-Leigon Agreement of February 29, 1952 between the Electrician's Union and Respondent Teamsters. This agreement provided as follows:

> "The mutual understanding as to the interpretation of the existing agreement, copy of which is attached, between the two International Unions was determined as follows:
>
> "*Paragraph #2:* Crew or Line truck referred to in this paragraph shall be loaded by Warehousemen if available, or composite crew, at the start of the shift, and operated by I.B.E.W. men. All other materials required during the shift other than first loaded as above, shall be requested from the warehouse or yard and delivered by vehicle operated by Teamsters.
>
> "It was further mutually agreed that a composite crew of Warehousemen and Electricians shall work together in the warehouse storing electrical material exclusively. One to one ratio between the two crafts shall be maintained as equally as possible." [Teamsters' Ex. 6A].

The agreement referred to in the first paragraph of the Carter-Leigon Agreement was dated February 11, 1942 and was executed by the International Unions [Electricians and Teamsters] and provided:

> "It is hereby agreed that the operators of vehicles delivering electrical material come under the jurisdiction of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS.
>
> "It is further agreed that the operators of vehicles used for electrical construction work, maintenance work, or electrical repair work—that is, when such vehicles are used for transporting man or men and/or material to and from job, and said vehicle remains at job site with man or men in the performance of electrical work, and the operation of the vehicle is an integral part of the work—such operator comes under the jurisdiction of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS.
>
> "It is understood and agreed that the equipment operated by electrical workers shall only be the truck carrying the line and maintenance crews, tools, etc., to and from the job, or the emergency car from electrical contracting shops carrying only tools and repair equipment for emergency work. Operation of all delivery equipment for the delivery of materials of all character, such as poles, pipes, transformers, cables, and electrical appliances, such as refrigerators, radios, etc., shall be the jurisdiction of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS." [Teamsters' Ex. 6B].

As will be noted both Agreements were between the two unions only and neither contained any arbitration procedure for determining their application. The Board in making its determination following the Section 10(k) Hearing concluded that these agreements did not give any right to the work assignments to the Teamsters Union. That determination was based on the long history of practice at the Nevada Test Site where the Carter-Leigon Agreement has never been applied to compounds in the manner contended for by Respondent. The decision was also based on testimony of a number of witnesses who were present at the time the Agreement was negotiated and executed in 1952. The evidence was to the effect that the subject matter of the Carter-Leigon Agreement was a particular warehouse storing electrical supplies exclusively located in Mercury, Nevada and had no application at all to forward areas compounds. We do not understand Respondents to take exception to the Board's determination in this regard; we understand only that they object to the Board exercising jurisdiction to make such determination.

Also the Teamsters rely as to certain aspects of the disputed work assignments on a Joint Board award which it contends awarded the disputed work to them [Teamsters' Ex. 13]. This award was rendered under the procedure set out in the agreement of the Respondent with REECO [Teamsters' Ex. 5]. It was later clarified by the Joint Board upon request of REECO [Teamsters' Exs. 14 and 15]. The body making that award was a bi-partite committee consisting one-half of Respondent itself and the other half employer contractors having agreements with the Teamsters' Union. The

Electricians' Union and electrician employers were neither covered by the agreement nor party to the procedure resulting in the award. REECO contends that the award is invalid since the agreement under which it was given expressly states [Teamsters' Ex. 5] Section II, subparagraph D that the Joint Board may not resolve any jurisdictional disputes [See Footnote 23 of Trial Examiner's Decision, R. 35].

The Electricians' Union proceeded under their agreement with REECO and presented their work assignment claim to the Joint Conference Committee procedure set forth in that agreement. They likewise received an award setting forth their right to the work [IBEW Exs. 2A and 2B].

Shortly *after* the Charge was filed giving rise to this case [May 5, 1964, R. 3] the Teamsters filed an action in the Nevada Federal District Court seeking to enforce such award and to litigate its asserted contractual claims. The pleadings in that case were placed into evidence in a Hearing before the Trial Examiner as General Counsel's Exhibits 6A through 6F inclusive. General Counsel's Exhibit 6F is an Order of the District Court staying that proceeding pending final resolution of this unfair labor practice case before the Board and the Court. The Court's authority to stay its jurisdiction in recognition of the primary jurisdiction of the Board was recently upheld by this Court in a case directly in point and also involving REECO and the Nevada Test Site (*United Association, etc., v. Hon. Roger D. Foley Jr., Judge of the U.S. District Court, District of Nevada,* CA-9, No. 21562).

In this context we reach Respondent's first affirmative defense to this Petition for Enforcement, its con-

tention that since its claims are based upon contract (we assume the Carter-Leigon Agreement and its collective bargaining agreement) the Board is without jurisdiction to resolve the dispute and the Federal District Court is the only tribunal who may declare contract rights.

We submit that Respondent's contention is totally lacking in merit. In the first place Section 10(k) of the Act not only authorizes the Board to resolve a jurisdictional dispute, it requires it to do so. This was the decision of the Supreme Court in *N.L.R.B. v. Radio and Broadcast Engineers* (1961), 364 U.S. 573. In that case both of the disputing unions, as here, had a collective bargaining agreement with the employer. While the terms of the agreements did not largely enter into resolutions of dispute, it is at least of some value that the Supreme Court's holding that Section 10(k) of the Act both authorized and required the Board to determine the merits of a jurisdictional dispute occurred in a context in which the disputing unions had written agreements with the employer.

Even more directly in point is the decision of the Supreme Court in *Carey v. Westinghouse Electric Corp.* (1964), 375 U.S. 261. In that case the union sought to compel arbitration of its claim to be the exclusive representative of employees performing certain work assignments to the exclusion of another labor organization whose employees were performing the work. Nothing had occurred (that is concerted activity) to warrant the Board exercising its unfair labor practice jurisdiction and no proceeding was pending before the Board. In this context the Supreme Court held that there was no reason why arbitration between the em-

ployer and one of the unions should not go forward. In its decision the Supreme Court strongly emphasized the fact that no Board proceeding was pending or foreseen. At the same time the Court recognized that if the Board did take jurisdiction that it would have superior authority over any arbitration award rendered under the agreement. Thus the Supreme Court stated:

> "Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, *the Board's ruling would, of course, take precedence;* and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301.
>
> * * * * *
>
> *"The superior authority of the Board may be invoked at anytime.* Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area" (Emphasis added). *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261, 272.

In *Carey v. General Electric Company (*2nd Cir. 1963), 315 F. 2d 499, the facts were essentially the same, that is, no Labor Board proceeding existed or was anticipated, and the court directed arbitration. The fact that the court would not have done so if a Board proceeding was in existence, (or a conflict existed, as here) however, is clearly demonstrated by its following statement:

> "12. * * * We note, in passing, that even though the possibility of some future presentation of the representation issue to the NLRB should not forestall the courts from directing arbitration, *it is not at all inconsistent for a court to*

> *defer its judgment should the Board already be seized of jurisdiction* over a complaint by one of the parties to the contract. See Note 59 Colum. L. Rev. at 170." (Emphasis added). *Carey v. General Electric Company,* 315 F. 2d 499, Footnote 12, 511.

In *Local 33, Int. Hod Carriers, etc. v. Mason Tenders, Etc.* (2nd Cir. 1961), 291 F. 2d 496, the court also ordered arbitration of what was essentially a jurisdictional dispute between two labor unions. The court was careful to note that it was doing so in a context in which there was no proceeding pending before the National Labor Relations Board and nothing had occurred to justify anticipating such a proceeding, noting, however:

> "Perhaps it is fair to conclude that where the contract sued upon impinges upon some clearly established activities of the NLRB a District Court must step aside or at least stay its hand * * *"
>
> *Local 33, Int. Hod Carriers Etc. v. Mason Tenders, Etc.,* 291 F. 2d 496, 503.

In *N.L.R.B. v. Local 825, Internat'l Un. of Operating Engineers* (3rd Cir. 1964), 326 F. 2d 213, the respondent union in part defended its claim to disputed work in a jurisdictional dispute with another union on the grounds that it had an arbitration award for such work. The Court held that this award was not binding on the other union and therefore was not binding upon the Board. As that decision reflects on its face, the Board in making the work assignment determination interpreted and applied the collective bargaining agreements of both unions and the Court affirmed and enforced the Board's Order.

The authorities, we submit, establish the principle in directly comparable circumstances that the Board has authority and jurisdiction to determine work assignment disputes notwithstanding the fact that one party's claim is based upon a contractual assertion. Other cases recognizing the Board's jurisdiction as primary to the Court's in similar context are:

Kentile Inc. v. Local Union 457, United Rubber, C., L. & P. Wkrs. (E.D.N.Y. 1964), 288 F. Supp. 541;

McLeod v. American Fed. of Television & Radio Artists, N.Y. Loc. (S.D. N.Y. 1964), 234 F. Supp. 832;

International Union, Etc. v. Metal Polishers, Etc., Union (S.D. Cal. 1960), 180 F. Supp. 280.

Respondent's contention is based perhaps in part upon authorities which are not applicable in these circumstances and which have been largely, if not totally, overruled by the Supreme Court. We refer to the decisions of this Court in *Square D Company v. N.L.R.B.* (9th Cir. 1964), 332 F. 2d 360 and *N.L.R.B. v. C & C Plywood Corporation* (9th Cir. 1965), 351 F. 2d 224. In both of those decisions this Court held that the question of whether or not the employer had refused to bargain as required by the Act was only indirectly involved. The Court reasoned that the essential characteristic of the dispute was the interpretation of a contract and only secondarily was the question of unfair labor practice involved. The Court held that in such a context the Board should leave the matter to contractual litigation either judicially or by arbitration. In the instant case the essential characteristic of the dispute is

a jurisdictional dispute prohibited by the Act. It is a quarrel involving concerted activity between two unions over which group of employees shall have exclusive right to perform certain work. While both may predicate their claims upon contract as well as practice, this does not change the character of the prohibited activity. Indeed jurisdictional disputes are typically disputes in which one or more of the unions alleges a contractual basis for its claim. The two collective bargaining agreements are agreements only between the Respondent union and REECO and the Electricians and REECO and not between the Respondent union and Electricians. Therefore, any award under either agreement is not binding on the other union. The only means of resolving such a tri-partite dispute is through the Board's proceedings since the parties have not seen fit to execute a tri-partite document providing a conclusive means of determining which union is entitled to the exclusive work assignment. We submit therefore that the rationale of either the *Square D* case or the *C & C Plywood* case is not applicable to an unfair labor practice involving a jurisdictional dispute.

The Supreme Court granted certiorari in the *C & C Plywood* case and reversed it. *N.L.R.B. v. C & C Plywood Corp.* (1967), 385 U.S. 421, 17 L. Ed. 2d 486. The Supreme Court held that the Labor Board was given authority by Congress to interpret and apply contracts where it was essential to its determination of unfair labor practices. It stated:

> "The legislative history of the Labor Act, the precedent interpreting it, and the interest of its efficient administration thus all lead to the conclusion that the Board had jurisdiction to deal with

the unfair labor practice charge in this case. We hold that the Court of Appeals was in error in deciding to the contrary."

N.L.R.B. v. C & C Plywood Corp. 385 U.S. 421, ..., 17 L. Ed. 2d 486, 493.

In *C & C Plywood* the contract did not include the usual arbitration provision found in union agreements. However, this was not the predicate of the Supreme Court's decision. This is illustrated by the fact that on the same day that the Supreme Court decided the *C & C Plywood* case it also decided *N.L.R.B. v. Acme Industrial Co.* (1967), 385 U.S. 432, 17 L. Ed. 2d 495. Essentially the same question was presented to the Supreme Court in this case and the contract in question did include an arbitration provision. The Supreme Court reversed the Court of Appeals holding refusing to enforce the Board's Order on the same ground as *C & C Plywood* and the *Square D* case. The presence of an arbitration clause in the agreement did not lead the Court in the *Acme Industrial* case to any different conclusion than it reached the same day in the *C & C Plywood* decision and on the same point.

In *N.L.R.B. v. Huttig Sash & Door Co., Inc.* (8th Cir 1967), ... F. 2d ...., 65 L.R.R.M. 2431, the Court sidered the question of whether the *C & C Plywood* decision of the Supreme Court applied only where the agreement did not contain an arbitration clause or whether it affirmed the Board's jurisdiction to interpret and apply contracts without regard to the presence or absence of an arbitration clause. That Court concluded:

"It is also possible, perhaps, for one to say that in C & C Plywood the Court emphasized the absence of an arbitration provision and seemingly

used this in partial justification of the conclusion it reached, whereas in Acme it contrarily expressed concern about overburdening that same arbitral process. If there is any trace of logical inconsistency here, it is lost and rendered meaningless, we think, in what we regard as the other overriding and vital features of the two decisions, namely, that, of itself, neither the presence of a problem of contract interpretation nor the presence of an arbitration provision in the contract deprives the Board of jurisdiction."

N.L.R.B. v. Huttig Sash & Door Co., ... F. 2d ...., 65 L.R.R.M. 2435.

Finally, the question we have been considering was brought to this Court's attention in *N.L.R.B. v. Honolulu Star-Bulletin, Inc.* (9th Cir. 1967), 372 F. 2d 691. The Court had withheld decision in this case pending determination of the *C & C Plywood* case by the Supreme Court. Here, again, the issue before the Court was whether the refusal to bargain determination was within the Board's authority since its determination required consideration of contractual matters. The decision, rendered after the Supreme Court's *C & C Plywood* decision, recognized the authority of the Board to determine contract matters stating that the Supreme Court's decision "* * * unquestionably determined the issue of the Board's jurisdiction in this case" 372 F. 2d at 693.

In the *Honolulu Star Bulletin* case the Court did not consider whether or not the agreement in question contained an arbitration clause. The record before the Court has been inspected and it also does not disclose whether the agreement contained an arbitration clause.

The presence or absence of such a clause was obviously treated by the Court as being irrelevant to its recognition that the Board has jurisdiction in the exercise of its unfair labor practice prosecuting authority to interpret and apply contract provisions.

It is submitted therefore that there is much authority in judicial recognition of the Board's jurisdiction to interpret and apply contracts in the exercise of its otherwise clearly established authority. The Act itself recognizes this in Section 10(a), (29 U.S.C. Section 160(a)) where the authority of the Board to prosecute unfair labor practices is established. The Act there states "this power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise."

II.

The Complaint Properly Alleged and Prosecuted Conduct Arising After the Filing of the Amended Charge.

Respondent contends that the original Charge filed May 5, 1964, and the Amended Charge filed May 11, 1964, complained only of Respondent's economic action taken in connection with the "composite-staffing" of the forward compounds and did not relate to the dispute as to the "hauling" of material from the forward compounds to the point of use. While Respondent admits that the "hauling" dispute existed prior to the filing of the charges by REECO, Respondent argues that no economic action was taken in connection with this dispute during the periods covered by said charges [R. 68].

Initially it should be noted that the Amended Charge filed by REECO on May 11, 1964, specifically asserted

that the activity engaged in by Respondent at the Nevada Test Site had as one of its objectives to force and require REECO to assign the work of "transporting . . . materials from the point of . . . unloading . . . to the point of installation or utilization" [R. 6] to teamsters.

The Trial Examiner specifically concluded that the "hauling" issue had been raised by the Amended Charge [R. 33].

Even if the Charge and Amended Charge had not specifically alleged the existence of actions by Respondent relating to "hauling" issue, these activities could be and were properly considered as matters within the jurisdiction of the Board under Section 10(k). The Trial Examiner quite properly concluded that the filing of a charge does not crystalize the Board's jurisdiction to actions taken prior to the filing of that charge but on the contrary is merely an initiating procedure which sets in motion the investigatory machinery of the Board as to all conduct both prior and subsequent to the filing of the charge relating to the general type of unfair labor practice which has been alleged [R. 33]. When this very issue was presented to the United States Supreme Court in *N.L.R.B. v. Fant Milling Co.* (1958), 360 U.S. 301, the court held:

> "A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. *Labor Board v. I. & M. Electric Co.,* 318 U.S. 9, 18. The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not

the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act. The Board was created not to adjudicate private controversies but to advance the public interest in eliminating obstructions to interstate commerce, as this Court has recognized from the beginning. *Labor Board v. Jones & Laughlin,* 301 U.S. 1.

"Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge. For these reasons we adhere to the views expressed in *National Licorice Co. v. Labor Board.*"

N.L.R.B. v. Fant Milling Co., 360 U.S. 301, 307-309.

In reaching this conclusion the Supreme Court upheld a previous Supreme Court decision in *National Licorice Co. v. N.L.R.B.* (1940), 309 U.S. 350, 369. The aprpoach of the Trial Examiner in the instant case has been consistently followed by the Board.

See *E.g.:*

Texas Industries, Inc. (1962), 139 N.L.R.B. 365, 366-367;

Lodge 68 of the Int'l Ass'n of Machinists (1949), 81 N.L.R.B. 1108, 1113 at n. 3.

To the extent that there is any limitation upon the Board in prosecuting unfair labor practices arising after the filing of the charge, this limitation relates only to conduct which would violate provisions of the Act unrelated to the provisions upon which the charge was based. Thus, the Supreme Court in the *National Licorice Co., supra,* decision stated:

> "Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. * * *"
>
> *National Licorice Co. v. N.L.R.B.,* 309 U.S. 350, 84 L. Ed. 799, 813.

Accord:

> *N.L.R.B. v. Fant Milling Co., supra,* 360 U.S. 301, 309.

Again, in *N.L.R.B. v. Lasko Metal Products, Inc.* (6th Cir. 1966), 363 F. 2d 529, the court in finding jurisdiction in a case similar to the one before this Court stated:

> "This language in the Union charge was certainly adequate to fulfill the statutory requirement and to initiate NLRB action. Once a charge has been made, the NLRB investigation and complaint are not confined to the specific details of the charge but may extend to related matters of the same class of violations charged. [Citations omitted]"
>
> *N.L.R.B. v. Lasko Metal Products, Inc.,* 363 F. 2d 529, 530.

The Respondents contend that their economic actions relating to "hauling" commenced on May 11, 1964, after the filing of both the Charge and Amended Charge, and that this activity did not permit the Board to find a violation of Section 8(b)(4)(D) as to both the "composite-staffing" and the "hauling" disputes since they involved "different and unrelated claims" [R. 69]. This argument ignores the fact that the "hauling" dispute was in fact in existence at the time Respondent filed the Charge and Amended Charge [R. 68], that the Amended Charge specifically referred to the "hauling" dispute and that both the "composite-staffing" and the "hauling" unfair labor practice violations involved activities in violation of Section 8(b)(4)(D), constituted part of a comprehensive jurisdictional dispute and took place as a part of a continuous series of activities. Thus, it is quite clear that the Board did not exceed its jurisdiction in connection with the "hauling" dispute.

III.

The Board Properly Ordered the Issuance of a "Broad Form" Cease and Desist Order

Respondent urges that all economic action taken by Respondent related to work being assigned by REECO to the Electricians and that Respondent did not engage in a jurisdictional dispute with any craft other than the Electricians [R. 69-70]. Based upon this contention, Respondent argues that the Cease and Desist Order and Notice pursuant thereto should be modified to cover only the work in dispute between the Respondent and the Electricians [R. 70-71].

The premise upon which Respondent bases its argument arises from a complete misconception of the find-

ings of the Board and the Trial Examiner. The Board in making its jurisdictional determination held that the proscribed activity was engaged in only to compel a change of work assignments from the Electricians to Respondent [R. 9-10]. The Trial Examiner found that while that was the purpose of the proscribed activity, it was intentionally directed, by means of job interference, not only to supplies and materials destined to electricians, but to all of the various trades [R. 20]. Respondent states this holding as being one paramount to a holding that proscribed activity directed to non-electricial trades constituted a jurisdictional strike as to such non-electrical trades. This is not at all the effect of the Examiner's finding. He merely found that the Respondent interfered with the work of all trades to support its jurisdictional claims against the Electricians.

The holding of the Trial Examiner is more than abundantly supported by the record. Respondent instituted and continued a course of conduct designed to interfere with all of the various trades in the forward area.

At noon on May 11, 1964, Teamster Business Agent Batista openly instructed the warehousemen that they were to sit down and do no work after they returned from their luncheon break at 12:30 [Tr. 290-291, 1666]. The warehousemen complied and engaged in what amounted to a sit-down strike at the Mercury warehouse. During that time, they refused to do *any work,* including any issue of material to *any craft.* While their interferences in the morning allegedly related only to electrical supplies, in the afternoon this was converted into a wholesale refusal to issue or deliver materials to any compound or to any craft [Tr.

290-291]. All of this was admitted by Teamster Steward Gile [Tr. 1666-1667]. At approximately 2:30 in the afternoon, the Company advised the Union officials that the employees were not being paid while on the sit-down strike, whereupon they all walked off the job.

On May 12, 1964, the Teamsters declared a general Teamsters strike and placed a picket line at the entrances to the test site, and this strike was participated in by all members of the Teamsters Union employed by the Company. It lasted until enjoined [Tr. 2110-2111, 294, 292] by the Federal District Court upon the petition of the Regional Director.

Mr. William Carter, the Teamsters highest executive officer [Tr. 86], admitted that on or about April 17, 1964, he ordered his business agents to go to the Test Site and instruct all stewards and warehousemen not to permit the loading and delivery of any materials to the forward compounds [Tr. 307, 308, 309, 310, 314, 383]. The result was that these business agents on the next day complied with Mr. Carter's demands [Tr. 2078-2079, 2071] and as will hereafter appear, deliveries to *all* compounds for *all* crafts in the forward areas were completely disrupted. Mr. Carter subsequently contradicted his earlier testimony and stated that his business agents had misunderstood him and that his instructions had been to stop deliveries of material to the electrical compounds only [Tr. 2079].

What actually happened after Mr. Carter gave his instructions to the business agents on or about April 17, 1964, is the following: Richard A. Campbell, an area superintendent operating from a compound located in Area 12 which employed all of the various crafts, such as electricians, laborers, plumbers, sheetmetal workers,

operating engineers, carpenters, painters and ironworkers [Examiner's Ex. 4, 124-125 of General Counsel Ex. 3] was called upon by Mr. Batista, a Teamster Business Agent, with two stewards and advised that "We would not be able to receive any material unless we had a Teamster clerk to check it off at the time it was delivered and tally it in." That function was then being performed by the crafts mentioned. Thereafter, the shuttle truck from the Mercury warehouses would drive up to the yard "but he wouldn't stop, he would just drive right on through . . ." [Examiner's Ex. 4, 129-130 of General Counsel Ex. 3].

William E. Boggs, the Warehouse Superintendent in the warehouse in Area 12, was advised by his driver Steward Gwinn that "* * * they would not deliver material to any compound where there was not a Teamster clerk to receive it, or a Teamster forklift operator to unload it." This statement referred to compounds in the various areas, and the threats and subsequent execution of them (as in the case of Campbell) included but was not limited to electrical compounds. Thereafter, the Teamsters loaded trucks for the various compounds but loads were received back at the warehouse yard without having been delivered, all as threatened by the steward. This condition continued for some two or three days [Examiner's Ex. 4, 139-141 of General Counsel Ex. 3]. Significantly, each truckload of supplies which the driver refused to deliver out of the Area 12 warehouse during this time were supplies destined for a single craft [Examiner's Ex. 4, 141-142 of General Counsel Ex. 3]. Quite commonly a truckload consists of supplies for various crafts but this was not so in these cases. Since each load was for a single

craft, this means there were refusals to deliver loads which had no electrical supplies aboard as they consisted of all general types of construction supplies including lumber and obviously non-electrical materials [Examiner's Ex. 4, 140 of General Counsel Ex. 3].

Sylvester Hooks, a laborer Foreman employed in Area 9 compound, described the following interferences: On April 27, 1964, he requested a truck from the Teamsters' pool located in the vicinity of Area 9 compound for the delivery of fence posts to be used by the laborers in the performance of their work. The Teamster Foreman (a classification covered by the Teamsters' contract) to whom Hooks made his request refused to assign a truck and the Teamster steward who was present "said that they wouldn't be hauling anything to or from the compound until they got teamster warehousemen and a forklift operator . . . teamster forklift operator . . ." [Examiner's Ex. 4, 142-148 of General Counsel Ex. 3]. The Teamster steward who made the statement was Hymas, who later testified (shown on the record as "Hyman") but carefully avoided any reference to the above-described event.

The frivolity with which the Teamsters engaged in the complete frustration of the attempts by crafts to obtain supplies in the forward compounds was best described by Mr. Lavendar, acting Superintendent of general stores in the main Mercury warehouse. On Monday, April 27, and Tuesday, April 28, he took precautions in giving instructions to Teamster delivery drivers concerning the delivery, because during the preceding week drivers had returned loads to the warehouse which had been dispatched for delivery to compounds [Tr. 270-271]. Commencing Monday morning, April

27, Mr. Lavendar called the Teamster foreman, Teamster steward and each driver into his office and instructed the driver that he was to take his assigned load to particular area superintendents, to see that it was delivered as instructed by the superintendent, and that he was not to return to Mercury with his load; that if he did, he would be subject to disciplinary action. These instructions were the same for all drivers, all were made in the presence of the Teamster steward and all drivers departed with their loads after receiving such instructions. This was some ten or eleven drivers on April 27 and 28 [Tr. 276-277]. Notwithstanding these instructions, none of the drivers just mentioned delivered their loads, but instead returned them to the warehouse. As each driver returned, Mr. Lavendar went through the same procedure. He called the Teamster steward and the driver into his office and asked why the driver had not delivered his loads to the particular area as instructed. All of them told him essentially the same thing, which was that Mr. Batista, the Teamster Business Agent, had instructed them if there were no Teamster personnel to offload the trucks, that they were not to permit them to be unloaded, but instead were to return them loaded to the warehouse. All drivers said this in the presence of the Teamster Steward, Mr. Gile, who made no disagreement [Tr. 301, 278-279].

Each delivery driver when being assigned to deliver a load of materials is given a delivery ticket for the supplies which he is to deliver to each craft, so that he may obtain a signature from each craft when the delivery is made [Tr. 270]. As each of the drivers returned on April 27 and 28, Mr. Lavendar took posses-

sion of the various delivery tickets covering each load [Tr. 279]. These were produced at the hearing, and the witness went through all delivery tickets for all the loads which were not delivered pursuant to the Business Agent's instructions on April 27 and 28, and they clearly prove that the Teamsters were at that time refusing to deliver materials to *all* construction crafts. Thus the materials which the drivers did not deliver on April 27 and 28 included those for electricians, plumbers, carpenters, office supplies, drillers (operating engineers), sheetmetal workers, ironworkers [Tr. 281-288]. In some instances these same drivers had materials on their trucks which were destined for one of the recognized warehouses in addition to materials for a compound. Significantly, while those drivers refused to deliver the material on their trucks to compounds, they did make delivery of the materials destined for a recognized Teamster warehouse [Tr. 282-283]. This clearly proves that the Teamsters were consciously refusing to deliver to all of the various trades, since there was no physical inhibition against delivering non-electrical materials to any particular craft compound any more than there was to a recognized warehouse. In other words, the Respondent sought to enforce its demands for work assignments of electricians not only by refusing to deliver to that craft, but by a general refusal to deliver to any and all crafts in the same compound.

The Teamster steward present when Mr. Lavendar gave his instructions to the various drivers and when those drivers explained that they had refused to deliver because of Batista's instructions was Mr. Gile [Tr. 279]. Mr. Gile testified in this proceeding, but the Teamsters asked him no questions concerning the events

described by Lavendar, and there is nothing in his testimony or in his conduct which in any way implies that the drivers were not speaking truthfully when they stated that Batista, the Business Agent, had instructed them to make no deliveries to any compound unless Teamster personnel offloaded their trucks. Those statements, being made in the presence of this steward, who made no disagreement with them, and the failure of the Teamsters to inquire of him, Mr. Batista or the drivers in this hearing concerning them certainly constitute an admission by the Teamsters that the drivers spoke truthfully concerning Batista's instructions. There were many other instances of refusal to deliver to various crafts [Tr. 404-406, 589-592, 866-867].

The above-described incidents demonstrate quite clearly that during the period considered in this proceeding, Respondent used every means possible and acted upon every person available to it in preventing the delivery of materials to *all* the forward compounds and *all* the various crafts at the Nevada Test Site and not solely the Electricians. Nowhere in its Answer To Petition For Enforcement [R. 61-71] does Respondent deny that it interfered with the delivery of materials to various craft unions other than the Electricians. Rather, Respondent simply argues that it was not engaged in a jurisdictional dispute with these other crafts. It is, of course, unnecessary to find the existence of a jurisdictional dispute with these other crafts to support the broad form ease and Desist Order and Notice at issue in this case. It need only be shown that Respondent demonstrated a predisposition to coerce REECO through the various crafts at the Nevada Test Site with the object of forcing REECO to assign par-

ticular work to Respondent. Once it is demonstrated that Respondent in attempting to accomplish its goals as to the Electricians also refused to deliver materials to the other crafts at the Nevada Test Site, the broad form Cease and Desist Order and Notice are within the jurisdiction of the Board to issue.

The propriety of the issuance of a broad form Cease and Desist Order has been raised most frequently in the area of employer unfair labor practices. Thus, the Supreme Court of the United States in *N.L.R.B. v. Express Pub. Co.* (1940), 312 U.S. 426, 85 L. Ed. 930, while not finding the basis for a broad form order in connection with certain alleged unfair labor practices on the part of the employer, set out what has become the guide line to the propriety of issuing such orders. The court stated:

> "We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. * * *"
>
> *N.L.R.B. v. Express Pub. Co.,* 312 U.S. 426, 437, 85 L. Ed. 930, 937.

A subsequent decision by the Supreme Court in *May Department Stores Co. v. N.L.R.B.* (1945), 326 U.S. 376, 90 L. Ed. 145, rephrased the scope of the Board's

jurisdiction in issuing the Cease And Desist Order in the following terms:

> "The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it 'from engaging in any unfair labor practice affecting commerce.' Section 10(a). Equity has long been accustomed in other fields to reach conclusions as to the scope of orders which are necessary to prevent interferences with the rights of those who seek the courts' protection. Injunctions in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the act. We think that the Board has the same power to determine the needed scope of cease and desist orders under the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation."
>
> *May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376, 390-392, 90 L. Ed. 145, 157-158.

In reaching this conclusion the court reaffirmed the above-quoted language in the *Express Pub. Co.* decision.

It would seem quite apparent that where as here a union seeks to coerce an assignment of work by an employer during a jurisdictional dispute both through conduct directed at that union with which the dispute exists and through similar conduct directed at other unions with which the employer deals, the union engaging in such conduct fails within the rationale of the *Express Pub. Co.* and *May Department Stores Co.* de-

cisions thereby justifying a broad form Cease and Desist Order. The action of Respondent in the instant case in connection with its jurisdictional dispute with the Electricians demonstrated a predisposition to violate Section 4(b)(4)(i) and (ii)(D) of the Act and the Order and Notice issued as a result of that activity properly precludes both the direct and indirect methods employed by Respondent to coerce REECO to make certain work assignments.

In *Truck Drivers & Helpers Local Union No. 728 v. N.L.R.B.* (5th Cir. 1964), 332 F. 2d 693, cert. denied, 379 U.S. 913, the court was asked to determine the propriety of an order requiring a union to refrain from certain secondary boycott activities as to "any other person engaged in commerce or in any industry affecting commerce." The court held the order valid stating:

> "Finally, answering the third question, we conclude that the board order is not an unwarranted remedy under the circumstances found by the Board to exist here. In addition to the facts of this case which resulted in a finding by the Board that Local 728 pursued an *overall plan* according to which the employees of eight separate neutral employers were induced to refuse to handle Overnite shipments, the Board had other cases involving this Local which we think warranted its decision that it had 'demonstrated a proclivity to violate the act by secondary boycott activity against persons with whom it develops disputes.' We think the record satisfies the criteria which the Supreme Court has laid down in determining whether a Board Order is of impermissible breadth in N.L.R.B. v. Express

Publishing Company, 312 U.S. 426, 61 S. Ct. 693, 85 L. Ed. 930, and Communications Workers v. N.L.R.B., 362 U.S. 479, 80 S. Ct. 838, 4 L. Ed. 2d 896. See also N.L.R.B v. Local 542 etc., 3 Cir., 329 F 2d 512, 1964" (Emphasis added)

Truck Drivers & Helpers Local Union No. 728 v. N.L.R.B, 332 F. 2d 693, 697.

Accord:

N.L.R.B v. Teamsters, Chauffeurs, Etc., Local 901 (1st Cir. 1963), 314 F. 2d 792, 795.

By its actions in refusing to make deliveries to *all* forward compounds and *all* crafts at the Nevada Test Site, Respondent pursued an *overall plan* in violation of Section 8(b)(4)(i) and (ii) (D) of the Act which justifies the issuance of the Order and Notice in question. The acts of Respondent in the instant case demonstrated an active opposition to the purposes of the Act analogous to those found in *N.L.R.B. v. Bama Co.* (5th Cir. 1965), 353 F. 2d 320, where the court upheld an order requiring the employer to cease and desist from the unfair labor practices found and from "in any other manner infringing upon the statutory rights of its employees", in the following language:

"Respondent suggests the Board order is too broad and general and should be restricted to the facts of this case. The propriety of the Board order depends on the facts in each particular case. In view of the conduct of Respondent, we cannot say that the Board was not warranted in invoking this broad form of order on the basis of an attitude of opposition to the purposes of the Act. [Citations omitted]"

N.L.R.B. v. Bama Co., 353 F. 2d 320, 323-324.

The recent decision of the court of appeals in *Southwire Co. v. N.L.R.B.* (5th Cir. 1967), ... F. 2d ...., 65 L.R.R.M. 3042, provides a workable rationale for examining propriety of the Order and Notice issued in the instant case. There the court stated:

> "We have enforced orders of the kind here involved in cases where the record demonstrates a proclivity on the part of the employer to disregard the Act; otherwise such proposed orders have been limited to like or related conduct. * * *"
>
> "We treat the proposed order which is in the general language of §7 of the Act as being limited to this type of unfair labor practice conduct and as such it will be enforced. We think that Respondent had demonstrated a proclivity to violate these sections of the Act but there is no basis for finding a predisposition to violate other sections of the Act. Violations outside the class with which we are dealing should be left to the normal unfair practice procedures under the Act rather than to the contempt power of the court. [Citation omitted]"
>
> *Southwire Co. v. N.L.R.B.*, ... F. 2d ...., 65 L.R.R.M. 3042, 3044, 3045.

The actions of the Respondent in the instant case in connection with others than the Electricians both demonstrate a proclivity to disregard the Act and constitute "like or related conduct" to that directed at the Electricians. As such, the conduct is within the jurisdiction of the Board to preclude through its Order and Notice under any approach which could be asserted by the Respondent.

Conclusion.

The Intervenor and Charging Party, Reynolds Electrical & Engineering Co., Inc., prays that this Court issue a decree enforcing in whole the Order of the National Labor Relations Board which is the subject of this Petition for Enforcement proceeding, and requiring Respondent, its officers, agents and representatives, to comply therewith.

Dated: September 21, 1967.

GIBSON, DUNN & CRUTCHER,
WILLIAM F. SPALDING,
STEPHEN E. TALLENT,
JACK H. HALGREN,
By WILLIAM F. SPALDING,
Attorneys for Reynolds Electrical & Engineering Co., Inc., Charging Party and Intervenor.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William F. Spalding

No. 21,523

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Respondent,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 357, AFL-CIO,
Intervenor.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR INTERVENOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS UNION, LOCAL 357, AFL-CIO

CARROLL, DAVIS, BURDICK & MCDONOUGH,
PHILIP PAUL BOWE,
THORNTON C. BUNCH, JR.,
420 Balfour Building,
San Francisco, California 94104,
Attorneys for Intervenor.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Statutes

No. 21,523

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Respondent,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 357, AFL-CIO,
Intervenor.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR INTERVENOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS UNION, LOCAL 357, AFL-CIO

JURISDICTION

These proceedings are pursuant to a petition for enforcement of an order of the National Labor Rela-

tions Board under Section 10(e) of the National Labor Relations Act, as amended. (29 U.S.C. §§141, et seq.) The unfair labor practices having occurred in Nevada, this Court, accordingly, has jurisdiction.

STATEMENT OF THE CASE

Since approximately December 1952, Reynolds Electrical and Engineering Co., Inc. (hereinafter referred to as REECO) has been the prime contractor for Atomic Energy Commission nuclear testing work on the Nevada Test Site. Prior to October 30, 1958, nuclear testing involved atmospheric tests. After that date a moratorium on all nuclear testing remained in effect until September 6, 1961. (R. Vol. V, p. 441; Vol. VI, p. 570.) From the latter date to the present time, all testing at the Nevada Test Site has been underground, occasionally in tunnels but more commonly in well holes.

Because of the change in the method of testing, REECO developed various forward staging and supply areas, called compounds or forward area compounds, proximate to the points where the tests occurred. The compounds are subdivided into segments called craft compounds, where specialized material and supplies for the particular craft are stored for brief periods.

In the compounds, the various construction trades employees have shops and supporting facilities where they fabricate structures and equipment, which they

later load on trucks and transport to the point of use or installation in the same administrative area. (R. Vol. V, pp. 408, 409, 414; Vol. VII, p. 869.) The installation points or well holes are relatively close to the compound, varying from 1200 feet up to two miles. (R. Vol. IV, p. 357.) Materials needed at the various compounds are usually transported thereto from five warehouses, some of which have warehouse yards as well as storage buildings, located on the test site. The warehouses are staffed and operated by employees represented by the Respondent (R. Vol. VII, pp. 901-908; Vol. IX, pp. 935-936), and all hauling from the warehouses to the compounds of the various crafts is by drivers represented by the Respondent, under an Associated General Contractor labor agreement with REECO.

Unloading of material delivered to the compound of each craft is not performed by employees represented by Respondent, but manually by the craft involved, sometimes with the assistance of laborers, or of operating engineers if use of a forklift is required. (R. Vol. IV, pp. 360-363; Vol. VII, p. 865.) The same procedure applies to loading of fabricated materials at each craft compound for transportation to the point of installation. (R. Vol. V, p. 420; Vol. VII, p. 865.) No Teamsters warehouse personnel are or ever have been employed in any of the forward area compounds or staging areas. (R. Vol. V, p. 446; Vol. VII, p. 874.) It is clear from the whole record in the Section 10(k) work assignment dispute before the NLRB, and the Board so found, that throughout the history

of the Nevada Test Site electricians have operated the work vehicles hauling electrical supplies, equipment and fabricated materials from their own compounds to the point of use or installation in the same administrative area.

In November, 1963, Respondent began a campaign aimed first at inducing and later at coercing REECO to reassign certain work from employee electricians, who are members of or represented by Intervenor herein, to other employees, who are members of or represented by the Respondent. More particularly, an object of Respondent's above-described conduct was to force or require REECO to establish composite Respondent-Intervenor crews at all electrical compounds and to assign the work of driving vehicles and transporting electrical supplies and equipment from electrical compounds to various points of use or installation to employees represented by Respondent rather than to employees represented by Intervenor. In support of this purpose, Respondent picketed REECO from May 12 until May 28, 1964 when the picketing was enjoined by the U. S. District Court for the District of Nevada pursuant to a petition filed by the Regional Director of the Twentieth Region of the National Labor Relations Board under Section 10(l) of the National Labor Relations Act, as amended. (61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(l); herein called the Act.)

An initial unfair labor practice charge was filed against Respondent by REECO on May 5, 1964, and an amended charge followed on May 11, 1964, alleging

violations of Section 8(b)(4)(i)(ii)(D) of the Act. (R. Vol. I, pp. 3-5.) Upon said charges and pursuant to Section 10(k) of the Act, a hearing was conducted by a duly designated Hearing Officer of the Board on various dates between June 4, and June 25, 1964. The 10(k) Notice of Hearing described the disputed work as follows:

> The unloading of materials and equipment from vehicles at construction staging areas or area compounds within the AEC's Mercury, Nevada Test Site, the checking, tallying and placement or spotting of the materials and equipment within the construction staging areas or area compounds, the subsequent loading of materials and equipment on to vehicles at the construction staging areas or area compounds and driving such vehicles and unloading same at the point of utilization or installation of such materials or equipment.

On December 16, 1964, the National Labor Relations Board issued its Decision and Determination of Dispute (150 NLRB No. 44; R. Vol. I, p. 73), assigning the disputed work to electricians and holding that: (1) teamsters are not entitled to composite staffing at the electrical compounds but that such work is properly the work of the electricians; (2) electricians, rather than teamsters, are entitled to perform the work of driving vehicles transporting electrical supplies from the electrical compounds to the point of use, and (3) Respondent is not and has not been lawfully entitled to force or require REECO to assign the disputed work to teamsters. (R. Vol. I, p. 83.)

Subsequent to the filing of the unfair labor practices charges by REECO, and prior to the hearing in the Section 10(k) matter, Respondent instituted a proceeding in the U. S. District Court for the District of Nevada to compel specific performance of an arbitration award purporting to award the disputed work to it rather than to employees represented by Intervenor. REECO and Intervenor filed answers to the Respondent's action and on March 5, 1965, the Court issued an order staying the proceedings pending final decision in the Board proceedings.

After Respondent advised the Regional Director of the Twentieth Region of the National Labor Relations Board that it would not accept or comply with the Board's 10(k) determination a complaint alleging violation of Section 8(b)(4)(i)(ii)(D) issued herein.

The record transcript of the 10(k) proceedings was stipulated into evidence at the hearing before a Trial Examiner of the National Labor Relations Board and nothing offered in the way of newly discovered evidence by Respondent was admitted into evidence at that hearing.

The Trial Examiner in his decision concluded, *inter alia,* that:

> By refusing to make deliveries of materials destined for forward compound areas manned by employees of REECO, who are represented by IBEW, and by other labor organizations; by engaging in a strike; by threatening to engage in a strike; by inducing and encouraging employees of REECO to engage in a strike or a concerted refusal in the course of their employment to per-

> form services, both by means of oral instructions and by the imposition of a picket line, with an object of forcing or requiring Reynolds Electrical and Engineering Co., Inc. to assign the work of driving vehicles transporting electrical supplies from forward electrical compounds to point of use, and for the further purpose of requiring composite staffing of forward electrical compounds by requiring REECO to employ employees represented by Respondent at the forward electrical compounds on a ratio of one to one with other craftsmen manning said electrical compounds, or to employ members of the Respondent at said electrical compounds to the exclusion of other employees who are represented by other craft unions, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(D) of the Act.
>
> (Tr. Ex's. Dec., pp. 21 & 22; R. Vol. I, pp. 37-38.)

Respondent thereupon appealed to the National Labor Relations Board through the filing by it of Exceptions to the Trial Examiner's Decision, raising the same arguments it now attempts to assert to this Court in its Answer to Petition for Enforcement. It should be noted that the contentions now asserted by Respondent to this Court were also raised by Respondent in the Section 10(k) proceeding and also in the proceeding before the Trial Examiner. Thus, at each stage of these proceedings, Respondent's contentions were rejected in accordance with well-established principles of law.

The National Labor Relations Board affirmed the decision of the Trial Examiner after consideration

of the entire record in this case and adopted the findings and conclusions of the Trial Examiner that Respondent engaged in unfair labor practices within the meaning of Section 8(b)(4)(D) of the Act. *(Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 631, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America and Reynolds Electrical & Engineering Company, Inc.,* 157 NLRB No. 130.

Upon the failure of the Respondent to observe and comply with the decision and order of the National Labor Relations Board, this case was brought to this Court pursuant to the National Labor Relations Board's petition for enforcement of its orders.

QUESTIONS INVOLVED

1. Whether there is substantial evidence in the record as a whole to support the determination of the National Labor Relations Board that electricians rather than teamsters are entitled to performance of the work of unloading of materials and equipment from vehicles at construction staging areas or area compounds (referred to as composite staffing) within the Nevada Test Site and the subsequent loading of materials and equipment on to vehicles at the construction staging areas or area compounds and driving such vehicles and unloading same at points of utilization.

2. Whether Respondent's non-compliance with the National Labor Relations Board's work assignment

determination and its activities directed toward reassignment of the disputed work to Respondent's members constitute activities proscribed by Section 8(b)(4)(D) of the Act.

SUMMARY OF ARGUMENT

Under well established law the National Labor Relations Board correctly asserted jurisdiction over the subject matter of this case.

The findings and conclusions of the National Labor Relations Board that electricians employed by the Reynolds Electrical and Engineering Company (REECO), rather than teamsters represented by Respondent, are entitled to the work assignments of unloading of materials and equipment from vehicles at construction staging areas on area compounds (composite staffing) within the Nevada Test Site and the subsequent loading of materials and equipment on to vehicles at the construction staging areas or area compounds and driving such vehicles and unloading same at points of utilization and installation of said materials and equipment is supported by substantial evidence in the record herein. The 10(k) decision of the National Labor Relations Board is clearly neither arbitrary nor capricious and therefore must be upheld. *NLRB v. International Longshoremen's and Warehousemen's Union* (C.A. 9, 1967), 378 F.2d 33.

Consequently, the failure of Respondent to comply with the National Labor Relations Board's work dispute determination and Respondent's picketing and

other activities directed toward requiring the reassignment of said work to teamsters, constitutes conduct violative of Section 8(b)(4)(D) of the Act.

ARGUMENT

THE FINDINGS AND CONCLUSIONS OF THE TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD, ADOPTED AND AFFIRMED BY THE NATIONAL LABOR RELATIONS BOARD, ARE SUPPORTED BY EVIDENCE IN THIS RECORD OVERWHELMINGLY ESTABLISHING THAT ELECTRICIANS ARE ENTITLED TO THE WORK ASSIGNMENTS OF UNLOADING OF MATERIALS AND EQUIPMENT FROM VEHICLES AT CONSTRUCTION STAGING AREAS OR AREA COMPOUNDS WITHIN THE NEVADA TEST SITE (REFERRED TO AS COMPOSITE STAFFING) AND THE SUBSEQUENT LOADING OF MATERIALS AND EQUIPMENT ON TO VEHICLES AT THE CONSTRUCTION STAGING AREA OR AREA COMPOUNDS AND DRIVING SUCH VEHICLES AND UNLOADING SAME AT POINTS OF UTILIZATION. ACCORDINGLY, RESPONDENT'S ACTIVITIES DIRECTED TO THE END THAT SUCH WORK BE REASSIGNED TO ITS MEMBERS CONSTITUTES CONDUCT VIOLATIVE OF SECTION 8(b)(4)(D) OF THE ACT. THEREFORE, THE PETITION FOR ENFORCEMENT OF THE BOARD'S ORDER IN THIS CASE SHOULD BE GRANTED BY THIS COURT.

A. The Evidence Clearly Establishes That the National Labor Relations Board Properly Assigned the Disputed Work to Electricians Rather Than to Those Teamsters and the Failure of Respondent to Abide by the Board's Decision Warranted the Board's Determination That Respondent Committed Unfair Labor Practices Within the Meaning of Section 8(b)(4)(D) of the Act.

Section 8(b)(4)(D) provides that:

> (b) It shall be an unfair labor practice for a labor organization or its agents— . . .
>
> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged

in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufac ture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

. . .

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

The complaint issued in this case by the National Labor Relations Board simply and directly alleges that:

VI

(a) Commencing on or about April 23, 1964, the Respondent Union, by its officers, agent and representatives, has engaged in, and has induced or encouraged individuals employed by REECO to engage in, refusals to transport and deliver goods, materials and supplies at REECO's N.T.S. location.

(b) Commencing on or about May 12, 1964, the Respondent Union, by its officers, agents, and representatives, engaged in threats to picket, and

in picketing of REECO's operations at the N.T.S. Respondent's picketing continued until approximately May 25, 1964, when it was enjoined by order of the United States District Court for the District of Nevada.

VII

(a) By the conduct described above in paragraph VI, Respondent Union, by its officers, agents and representatives, has engaged in and has induced and encouraged individuals employed by REECO to engage in, refusals in the course of their employment to use, transport, deliver or otherwise handle or work on goods, articles, materials or commodities or to perform services at REECO's N.T.S. location.

(b) By the conduct described above in paragraph VI, Respondent Union, by its officers, agents and representatives, has threatened, coerced, and restrained REECO.

VIII

(a) An object of Respondent Union's conduct described above in paragraphs VI and VII has been to force or require REECO to assign certain of the work performed at those portions of the N.T.S. location designated as the electrical compounds to employees represented by Respondent Union rather than to employees represented by the I.B.E.W.

(b) An object of Respondent Union's conduct described above in paragraphs VI and VII has been to force or require REECO to assign the work of driving vehicles transporting electrical supplies from the aforesaid electrical compounds

> to various points of use on the N.T.S. to employees represented by Respondent Union rather than to employees represented by the I.B.E.W.

These allegations were proved beyond any doubt. The conduct itself consisted of a campaign by the Respondent, beginning in the last few months of 1963 to force REECO, the prime support contractor at the Nevada Test Site, to take as much as possible of certain work away from the electricians and give it to employees represented by the Respondent. When REECO refused, the Respondent commenced overt proscribed activity, including threats, sit-downs, slowdowns, strikes, and picketing in an attempt to coerce REECO into reassigning the work from the crafts performing it to Respondent's members. (R. I, p. 86; Vol. XIV, pp. 2061, 2063-2066, 2078-2079, 2071; Vol. IV, pp. 270-271, 276-279, 281-288, 307; Vol. V, pp. 384, 393, 404-406; Vol. VI, pp. 589-592; Vol. VII, pp. 866-867.)

The National Labor Relations Board, in proceedings under Section 10(k) of the Act (150 NLRB No. 44), reviewed this conduct, which an examination of the Record will show to be overt and extensive, and in its 10(k) decision it succinctly summed up the conduct as follows:

> B. *Evidence of conduct violative of Section 8(b)(4)(D)*. . . .
>
> On April 17 or 20, 1964, Carter accompanied an A.E.C. inspector on a tour of the test site. At that time Carter observed electrical compounds being used for the storage of supplies and elec-

> tricians performing loading work at the electrical compounds. Carter advised REECO that he considered the electrical compounds to be "exclusive electrical warehouses" within the meaning of the Carter-Leigon Agreement and that REECO was violating that agreement by not utilizing composite crews to perform "warehousemen's" duties at the electrical compounds. Discussions between Carter and REECO officials failed to produce any agreement with respect to the matter and on April 23 Carter told the job stewards and Teamster business representatives to inform Teamster drivers not to deliver supplies to electrical compounds unless there was a composite crew and/or a warehouse receiving clerk. From April 23 to 28 Teamster drivers refused to make deliveries to the electrical compounds. (150 NLRB No. 44; R. Vol. I, pp. 73, 76-77.)

Additionally, Respondent picketed the Nevada Test Site from about May 12, 1964 until approximately May 28, 1964 when it was enjoined from doing so by Order of the United States District Court for the District of Nevada, pursuant to the National Labor Relations Board's request for a 10(l) injunction in this case.

Respondent's own version of the events suffices to establish proscribed conduct. Thus, in its brief in the 10(k) proceedings Respondent summarized as follows:

> On April 21, 1964, while Carter and the AEC investigator were in Area #17 electrical compound, Carter observed eight Electricians loading

a single pick-up truck. (Carter, Tr. 2062.) He was informed that they had been at it all morning. In the meanwhile, two Teamster-driven flat-rack delivery trucks were standing by, waiting to be unloaded. (Carter, Tr. 2062.) Carter spoke to Taylor, the superintendent in charge, and demanded that there be an equal number of Teamsters to Electricians assigned to load and unload the trucks, in accordance with the Carter-Leigon agreement. (Carter, Tr. 2063-2065.) Taylor said the area was just starting up and that although it might become a warehouse later, it was still an electrical compound where Electricians were to do the loading and unloading. (Carter, Tr. 2065.) Carter took the position that if it was not a warehouse, all the work belonged to the Teamsters because, under the Carter-Leigon agreement, Electricians had only been given composite staffing rights in warehouses. (Carter, Tr. 2065-66.) Carter then ordered the two Teamster trucks to return their loads to the Area #12 warehouse and stay there until REECO put a composite crew of Teamsters and Electricians in the electrical compound to do the unloading. (Carter, Tr. 2066, 2068-2071.)

The following day, Carter met with Lemon and Crockett, the REECO Project Manager, at the office of AEC. At this meeting, Carter informed REECO that the Teamsters were insisting that REECO comply with the Carter-Leigon agreement and the 1957 work assignment award and that until REECO complied, the Teamsters were going to refuse to deliver any materials to the electrical compounds. (Carter, Tr. 2073-2077.) REECO placed neither Crockett, Lemon nor

> Groeniger on the stand to dispute this testimony. Carter thereafter issued instructions to his business agents and stewards to stop only material going to electrical compounds "where the electricians were loading, unloading, and hauling it." (Carter, Tr. 2078-2079.) However, he learned later that in some cases the business agents and stewards had violated his instructions and had failed to make deliveries to other crafts where there were mixed loads and the first delivery was routed to an electrical compound. (Carter, Tr. 2079-2080.) Teamster business agents, however, have "no authority to establish policy" for the union. (Teamster's Brief, pp. 25-26.)

Thus, Respondent does not deny the conduct but rather argues that its object was not proscribed by Section 8(b)(4)(D). However, its 10(k) brief also admits that Respondent's conduct during the April 17-21 period was not concerned with its demand for a receiving clerk but was directed toward Respondent's work acquisition object of composite crews in electrical warehouses.

> It seems self-evident from the above review that the proscribed acts complained of, which occurred from April 22 to April 28, 1964 were intended to implement the Teamster demand for adherence by REECO with the Carter-Leigon agreement and the 1957 work task award as applied to composite crews in electrical compounds (construed by the Teamsters to be field warehouses or yards), and as applied to hauling of electrical materials from those compounds to points of use, other than on work trucks on the first load of the shift. The proscribed action was

> not taken to implement the Teamster demand for a receiving clerk in the mixed compounds, nor for a Teamster forklift operator in such compounds, the latter demand having been theretofore abandoned by the union. . . . (Teamster's Brief, pp. 26-27.)

Again, however, there is no refuting the National Labor Relations Board's well reasoned rejection of this fallacious contention as to "object." Thus, the Board in its 10(k) decision clearly pointed out the speciousness of the Teamster's contention:

> *Applicability of the Statute*
>
> While the Teamsters do not deny that they caused a work stoppage to support their claim to composite staffing at the electrical compounds, they contend, in effect, that there is no jurisdictional dispute under the Act as they do not seek the reassignment of work now being performed by electricians but merely that Teamsters be employed on an equal ratio with electricians.
>
> It is obvious, however, that the Teamsters could not have assumed that REECO would maintain twice the necessary work force at the compounds. Thus, the Teamsters in making their demand for composite staffing must have contemplated a reduction in the existing staff of electricians to permit an equalization of the number of Teamsters and electricians. We concluded, therefore, that as a practical matter the Teamsters' claim for composite staffing at the electrical compounds constituted a demand for the reassignment of work being performed by electricians to Teamsters, and that a dispute within the meaning

of 8(b)(4)(D) exists and the issue is properly before the Board for determination under Section 10(k).

As to the Teamsters' claim to the work of driving delivery vehicles from the compounds to the point of use, it is undisputed that the Teamsters engaged in picketing from May 12 to May 28, when picketing was halted by court order, to enforce their demand that the Employer reassign the driving of such vehicles from the electrical compounds to the point of use of the supplies. We conclude, therefore, that a dispute within the meaning of Section 8(b)(4)(D) exists with respect to this issue and that it is properly before the Board for determination under Section 10(k). (150 NLRB No. 44; R. Vol. I, pp. 73, 77-78.)

B. Respondent's Contentions That the National Labor Relations Board Was Without Jurisdiction to Entertain the Work Assignment Disputes and to Find That Respondent Engaged in Conduct Violative of the Act, or, in the Alternative That the National Labor Relations Board Should Have Deferred Its Proceedings in Favor of Respondent's Suit in the U. S. District Court to Compel Specific Performance of an Arbitration Award Purporting to Grant the Disputed Work to Respondent's Members Is Contrary to Well-Established Law.

Respondent, in all stages of the proceedings before the National Labor Relations Board, contended, as it contends in this Court, that it engaged in the admitted inducement and encouragement of work stoppages and the admitted picketing and threats of picketing, not for an object proscribed by Section 8(b)(4)(D) of the Act but for the purpose of enforcing REECO's compliance with the Carter-Leigon Agreement and/or the arbitration award of the Associated

General Contractors (AGC) Joint Committee.[1] The AGC award, in which proceedings Intervenor was *not* a participant, purported to determine that when vehicles other than work trucks are used, REECO's practice of assigning electricians to transport materials from compounds to actual work sites violated REECO's collective bargaining agreements with Respondent and that such work is to be performed by Respondent's members.

The basic inequity involved in enforcing a bilateral arbitration award in a trilateral work dispute is clearly evidenced by the facts of the present case where both unions are claiming the work under their respective collective bargaining agreements with different employer associations of which REECO is a member. The possibility of enforcement of any bilateral award in such a context can only result, as it has in the present case, in a race to the Unions' respective arbitration procedures, redundant litigation and awards, dissatisfaction, picketing, and labor unrest.

---

[1]It should be noted that although the Record, and this brief, refers to the AGC action as an award, the decision was merely a second-step grievance resolution rather than the decision of an independent impartial arbitrator. The AGC Joint Committee included representatives of REECO and Respondent but Intervenor herein was not represented in the Committee's proceedings. The Intervenor obtained a similar decision from N.E.C.A., awarding the disputed work to the Intervenor, but Respondent was not a participant in those proceedings. In these circumstances, neither award binds all three parties so neither can be considered a voluntary adjustment of the dispute, *Newspaper and Mail Deliverers Union of New York (News Syndicate Co.),* 141 NLRB 578, 580, or as a defense in this proceeding, *Local 327 Teamsters (S&W Construction Co.),* 142 NLRB 170, 173 and cases therein cited.

A unanimous California Supreme Court acting under Section 301 of the NLRA has directly held that there cannot be a valid arbitration award in the absence of a party directly affected by the award. *Retail Clerks Local* 770 *v. Thriftimart, Inc.,* 380 P. 2d 652, 655; 30 Cal. Rptr. 12, 15 (1963).

As the *Thriftimart* Court points out, the Supreme Court trilogy of Steelworkers arbitration cases (*United Steelworkers v. American Mfg. Co.,* 363 U.S. 564; *United Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574; *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593) which compel confirmation of an arbitration award and prohibit judicial review of both the issue of arbitrability and the merits of the award are based on the premise that:

> Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. . . . The judicial inquiry . . . must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. 363 U.S. at pp. 582-583 [4 L. Ed. 2d 1417].

The obvious lack of due process inherent in a bilateral arbitration in a trilateral situation has long been recognized by the National Labor Relations Board. If there is an unfair labor practice involved, generated by acts of one of the claiming unions, the Board has held in *New York Times,* 137 NLRB No. 78, that a jurisdictional dispute between two unions

is properly before the Board for determination notwithstanding the circumstance that both unions have arbitration clauses in their contracts with the employer. The Board held that such clauses cannot constitute a voluntary method for adjustment as envisaged by Section 10(k) since arbitration under either union's contract would not bind the other union.

Similarly in *News Syndicate Co., Inc.,* 141 NLRB No. 50, the Board stated:

> These arbitrations do not constitute an adjustment of the dispute within the meaning of Section 10(k) for the very basic reason that the Mailers arbitration would be binding only upon the Mailers and the Company, and the Deliverers' arbitration likewise would be binding only upon the Deliverers and the Company. The voluntary adjustment must bind *both* disputing Unions as well as the Employer to come within the meaning of voluntary settlement as set out in Section 10(k).

Thus, in the case of *Winslow Bros. & Smith Co.,* 90 NLRB 1379 (1950), which involved a dispute between the Teamsters and the Fur Workers, the Board refused to give controlling effect to a prior arbitration award of a particular work function to the Teamsters, observing "we particularly note the absence of the Fur Workers from the arbitration proceedings." Id. at 1384. See also *NABET,* 105 NLRB 355 (1953); *News Syndicate Co., Inc.,* 141 NLRB 578; *I.B.E.W., Local* 4, 129 NLRB 958; *NLRB v. Local 825, I.U.O.E.,* 55 LRRM 2112 (C.A. 3, 1964).

In *NLRB v. Radio & Television Broadcast Engineers Union,* 364 U.S. 573, the United States Supreme Court interpreted Sections 8(b)(4)(D) and 10(k) of the National Labor Relations Act to require the Board to exercise its "responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision." 364 U.S. at page 586.

In the *Radio Engineers* case, *supra,* the Court carefully weighed the alternatives of arbitration versus NLRB resolution of jurisdictional disputes affecting interstate commerce where an unfair labor practice was involved, and the Court reasoned that the NLRB, not arbitration, was the Congressionally required forum.

> Section 10(k) came into the [Act] . . . as the result of an amendment offered by Senator Morse which, in its original form, proposed to supplement this blanket proscription by empowering and directing the Board either "to hear and determine the dispute . . . or to appoint an arbitrator to hear and determine such dispute. . . ." The authority to appoint an arbitrator passed the Senate but was eliminated in conference, leaving it to the Board alone "to hear and determine" the underlying jurisdictional dispute. The Board's position is that this change can be interpreted as an indication that Congress decided against providing for the compulsory determination of jurisdictional disputes. . . . But Congress, after discussion and consideration, decided to intrust this decision to the Board. 364 U.S. at page 586.

The First Circuit has refused to order a bilateral arbitration under Section 301 of the LMRA in a trilateral work dispute case *even where no unfair labor practice was present* on a theory that an NLRB representation case certification of a unit might be affected.

> It is true that no unfair labor practice may have been committed . . . IAM protests that it is not seeking to represent other employees; it merely wishes their work. We are not impressed by this distinction. Certification and representation are both bottomed on work categories. On the facts here alleged a decision by the arbitrator in IAM's favor, if erroneous, would invade IBEW's certification . . . A union by contract with an employer cannot define the scope of its certification; that is the Board's function . . . [J]urisdictional disputes between unions are precisely its province. It is appropriate that this jurisdiction be exclusive. *Local 1505, I.B.E.W. v. Local 1836, I.A.M.,* 304 F. 2d 365, 367 (C.A. 1, 1962).

Once an 8(b)(4)(D) unfair labor practice has been committed and the unique and specific machinery of Section 10(k) of the National Labor Relations Act has been invoked, it seems manifest that Congress did not intend to subvert and destroy the efficacy of Section 10(k) of the Act by permitting an alternative and contradictory method of settling the dispute under Section 301 of the same Act. Congress in Section 10(k) considered the alternative of voluntary adjustment of the work assignment and specifically commanded the Board to determine the work assign-

ment unless the parties agree within ten days to a method of voluntary adjustment.

The National Labor Relations Board, in proceedings under Section 10(k) of the Act, after consideration of all factors including the arbitration awards, has now determined that REECO should assign the work in question to electricians represented by the Intervenor. Thus, the relief which the Respondent requests the Court to grant would directly conflict with the outstanding ruling of the Board. That this Court is without power to grant such relief is settled by *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261.

While holding that a suit to compel arbitration would lie despite the existence of a Board remedy, the Supreme Court recognized in *Carey,* as it had in *Smith v. Evening News,* 371 U.S. at 197-198, that the existence of a concurrent jurisdiction in the Board and the Courts could lead to serious problems. That is, the arbitrator might resolve the dispute a certain way; meanwhile, if the Board's jurisdiction were invoked, it might reach a contrary conclusion. There was, however, absolutely no doubt in the Court's mind as to the proper resolution of such a clash. It stated (375 U.S. at 272):

> Should the Board disagree with the arbiter . . . the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301 . . .
>
> . .
>
> The superior authority of the Board may be invoked at any time.

In *J. R. Condon & Sons, Inc.*, 148 NLRB 356 the Board stated, citing *Carey,* "further, under the circumstances here, the court's action enforcing the [arbitration] award does not bind the Board or require the Board to give any different effect to the award."

It is for the Board in the 10(k) proceedings to determine which union is entitled to the work in dispute.[2] The fact that one object of the union's strike activity was to force the employer to comply with the terms of their contract, does not take the activity out of 8(b)(4)(D)'s proscription where it appears that an object thereof is also to force the employer to assign particular work to the respondent union. *McLeod v. New York Paper Cutters Union, Local 119,* 53 LRRM 2380 (E.D. N.Y.).

In *Nichols Electric Co.,* 137 NLRB 1425 and 140 NLRB 458, enforced *NLRB v. Local 825, Operating Engineers,* 326 F. 2d 213, 55 LRRM 2112 (C.A. 3), a work assignment dispute was held properly before the Board for determination notwithstanding that the rival union relied upon an arbitration award in its favor, where, as here, the employer and the union representing employees to whom the work was assigned, insisted they were not bound by the award.

It is the fundamental concept of Section 8(b)(4)(D) that a union cannot resort to self-help to

---

[2]*Schiavonne & Sons,* 136 NLRB 993; *Abraham Kaplan,* 116 NLRB 1533; *Markwell & Hartz,* 120 NLRB 578; *News Syndicate Co., Inc.,* 141 NLRB 578; *Philadelphia Inquirer,* 142 NLRB No. 1, 52 LRRM 1504; *J. A. Jones Construction Co.,* 135 NLRB 1402; *New York Times Co.,* 137 NLRB 665; *New York Times Co.,* 137 NLRB 1435; *S & W Construction Co.,* 142 NLRB No. 19, 52 LRRM 1542; *Brown & Williamson,* 139 NLRB 1140.

attain its objective. Such conduct as that engaged in by Respondent, picketing and inducement of strikes and work stoppages to force the assignment of particular work tasks to members of a particular craft or labor organization rather than to employees in another craft or in another labor organization to whom the work has been assigned, has repeatedly been held to be conduct in support of jurisdictional disputes proscribed by Section 8(b)(4)(D). *LeBaron v. Los Angeles Building Council,* 84 F. Supp. 629 (S.D. Calif.) aff'd (C.A. 9), 185 F. 2d 405; *Schauffler v. Local 1091, Longshoremen* (C.A. 3), 292 F. 2d 182, aff'd 185 F. Supp. 203 (E.D. Pa.); *Doude v. Longshoremen* (C.A. 2), 242 F. 2d 808; *Schauffler v. United Association* (C.A. 3), 218 F. 2d 476; *Schauffler v. United Association* (C.A. 3), 230 F. 2d 572; *Doude v. Wood, Wire & Metal Lathers* (C.A. 3), 245 F. 2d 223; *Doude v. Longshoremen* (C.A. 2), 242 F. 2d 808; *Vincent v. Steamfitters* (C.A. 2), 288 F. 2d 276; *Cuneo v. Local 825, Operating Engineers* (C.A. 3), 306 F. 2d 394; *Local 450, Operating Engineers v. Elliott* (C.A. 5), 256 F. 2d 630; *Cuneo v. Local 825, Operating Engineers* (C.A. 3), 300 F. 2d 832; *McLeod v. Newspaper Deliverers' Union,* 205 F. Supp. 477 (S.D. N.Y.); *McLeod v. Truckdrivers Local 283,* 210 F. Supp. 769 (S.D. N.Y.) and see: *International Longshoremen v. Juneau Spruce Corporation* (C.A. 9), 298 F. 2d 177, aff'd 342 U.S. 237.

In connection with the theory advanced by the Respondent that it was merely seeking compliance by REECO with the terms of an arbitration award (the AGC award), the Trial Examiner stated:

> Additionally, with respect to the A.G.C. determination, the evidence reveals that IBEW did not participate in or become a party to the proceeding which led to the A.G.C. determination, and may not be said to have joined in a voluntary method of adjusting the facet of the IBEW-Teamster dispute with which the A.G.C. determination dealt. In the circumstances, the A.G.C. determination would not bind the IBEW nor serve to deprive the Board of jurisdiction in the Section 10(k) hearing.[3]

Moreover, the Board has consistently held that jurisdictional demands, in the guise of contract interpretation or enforcement, are not insulated from the reach of Section 8(b)(4)(D) merely because the work dispute stems from differing interpretations of contractual jurisdictional clauses. *Local 110, Sheet Metal Workers International Association, et al. (Brown and Williamson Tobacco Corp.),* 143 NLRB 947, 951. See also *Willamette National Lumber Co., et al.,* 107 NLRB 1141, 1143, footnote 2, and cases cited therein.

Respondent also contends that in making its 10(k) determination the National Labor Relations Board invaded the province of the U. S. District Court for the District of Nevada, which in Case No. 666 (Respondent's suit for specific performance of the AGC award) in its Order Staying Proceedings held that it "has concurrent jurisdiction with the National Labor Relations Board." The short answer to any such conten-

---

[3]*Newspaper and Mail Deliverers' Union of New York and Vicinity, Independent (News Syndicate Co., Inc.),* 141 NLRB 578, 580.

tion is Section 10(a) of the Act which vests the Board with the power to prevent unfair labor practices and further provides that "this power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." The Board has on occasion considered the decisions of other tribunals in reaching its decisions but it is well established that these decisions are not binding upon the Board. See *Spielberg Manufacturing Co.,* 112 NLRB 1080, and cases cited therein; *Carey v. Westinghouse,* 375 U.S. 261, 271-272.

Moreover, it is clear that the U.S. District Court for the State of Nevada disagrees with Respondent. It granted the National Labor Relations Board's request for its 10(l) injunction. Furthermore, the District Court has stayed Respondent's suit to enforce its contract, pending the resolution of this matter. The Stay Order is still in effect. In its *Order Staying Proceedings* the District Court clearly indicated that it believed that the National Labor Relations Board did have jurisdiction and should make a final, binding determination.

> . . . and the Court being fully advised in the law and the premises, the Court finds:
>
> 1. That the United States District Court for the District of Nevada *has concurrent jurisdiction* with the National Labor Relations Board over the matters alleged in plaintiff's Complaint and Supplemental Complaint.
>
> 2. That proceedings in this action should be stayed until after the National Labor Relations

> Board Trial Examiner's Hearing in Case No. 20-CD-134, scheduled to commence April 6, 1965, or until after any continued setting of said Trial Examiner's Hearing, and until after final decision thereafter by the National Labor Relations Board and appropriate review by a Court or Courts of Appeal having jurisdiction in the premises.
>
> It Is Therefore Ordered that all proceedings in the above entitled action be, and the same *are hereby, STAYED* until after the National Labor Relations Board Trial Examiner's Hearing in Case No. 20-CD-134, scheduled to commence April 6, 1965, or until after any continued setting of said Trial Examiner's Hearing, *and until after final decision thereafter by the National Labor Relations Board and appropriate review by a Court or Courts of Appeal* having jurisdiction in the premises, after which any party to the above entitled action may petition the Court for further proceedings herein. (Emphasis added.)

And, of course, the Board has already determined that as to the "contract" theory advanced by Respondent its interpretation of the Carter-Leigon Agreement is adverse to the Teamsters and that as to area practice:

> (w)e do find, however, that with respect to such factors as employer, industry, or area practice, and efficiency or economy of operation, the record on balance tends to support the Employer's assignment of the work to the electricians rather than to the teamsters. (R. Vol. I, p. 78.)

As the National Labor Relations Board's Trial Examiner stated:

> In context of the Respondent's contentions, the Board's observations in *Local 110, Sheet Metal Workers International Association, AFL-CIO, etc.,* 143 NLRB 947, 951, is pertinent. The Board there said:
>
> > The Board has consistently held that jurisdictional demands, in the guise of contract interpretation, are not insulated from the reach of Section 8(b)(4)(D) merely because the work dispute stems from the Employer's and Union's differing interpretations of a jurisdictional clause.
>
> In light of all the foregoing, and as the Respondent's first procedural defense reduces to a restatement of principles of law the applicability of which the Board in the Section 10(k) proceeding either explicitly or implicitly rejected; or to Board precedent which is distinguishable and without precedential efficacy in this unfair labor practice proceedings, I reject it. (R. Vol. I, p. 32.)

Respondent also will apparently assert to this Court that because the conduct alleged in Paragraph VI(b) of the National Labor Relations Board's Complaint occurred after the amended charge was filed by REECO, the Board had no right to hear this dispute. The fact that proscribed conduct occurring after the date of the amended charge was alleged as violative of the Act in the Complaint does not in any way affect the validity of the Board proceeding. *Texas Industries,* 134 NLRB 365-366-367; *Triboro Carting Corporation,* 117 NLRB 775, 777-778, enfd. (C.A. 2), 251 F. 2d 959. A National Labor Relations Board Complaint may allege all unfair labor prac-

tices which are related to or grow out of the charge. *National Licorice Co. v. NLRB* (1940), 309 U.S. 350; *NLRB v. Kohler Co.* (C.A. 7, 1955), 220 F. 2d 3; *NLRB v. Kingston Cake Co.* (C.A. 3, 1951), 191 F. 2d 563; *NLRB v. Westex Boot & Shoe Co.* (C.A. 5, 1951), 190 F. 2d 12; *Doude v. Longshoremen* (D.C. N.Y.) (1956), 147 F. Supp. 103; *Atlas Boot Mfg. Co.* (1956), 116 NLRB 565; *NLRB v. Fant Milling Co.,* 360 U.S. 301. Since the charge serves only as a request that the National Labor Relations Board take action, inclusion in the complaint of allegations not included in the charge but revealed by investigation is warranted even though additional conduct violative of the Act occurred *after* the filing of the charge. *NLRB v. Anchor Rome Mills, Inc.* (C.A. 5, 1956), 225 F. 2d 775; *NLRB v. Harris* (C.A. 5, 1953), 200 F. 2d 656; *H. N. Thayer Co.* (1952), 99 NLRB 1122; *Morristown Knitting Mills* (1948), 80 NLRB 731.

That the circumstances of this case place it squarely within the ambit of the United States Supreme Court's Decision in *NLRB v. Fant Milling Co.,* 360 U.S. 301, is apparent from the analysis set forth by the Trial Examiner:

> It seems apparent that investigatory machinery of the Board was set in motion by the charge herein which alleged proscribed conduct to enforce Respondent's claim to the disputed hauling and unloading work. The conclusion patently to be drawn from the Section 10(k) notice issued by the Regional Director, is that the investigation conducted under his auspices had revealed the existence of a dispute encom-

> passing not only the hauling work but the composite staffing issue, as well. The amended charge patently, by its terms, related in part the issue of transporting materials from the compound point of unloading to point of use. It was upon these charges and the investigation undertaken by him that the Regional Director noticed the Section 10(k) matter for hearing, and that the allegations of the complaint in the Section 8(b)(4)(D) proceeding were based. (R. Vol. I, p. 33.)

In *Fant Milling, supra,* the Supreme Court plainly stated:

> The Board was created not to adjudicate private controversies but to advance the public interest in eliminating obstruction to interstate commerce, as this Court has recognized from the beginning. *NLRB v. Jones & L. Steel Corp.,* 301 U.S. 1, 81 L. Ed. 893, 57 S.Ct. 615, 108 ALR 1352.
>
> Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge. For these reasons we adhere to the views expressed in *National Licorice Co. v. NLRB.*
>
> *NLRB v. Fant Milling Co.,* 360 U.S. 301, 308-309.

The Court in *Fant Milling, supra,* further explained the rationale of its decision by quoting di-

rectly from its decision in *NLRB v. National Licorice Co.,* 309 U.S. 350, 369, as follows:

> Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. The violations alleged in the complaint and found by the Board were but a prolongation of the attempt to form the company union and to secure the contracts alleged in the charge. All are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects. The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken. We think the court below correctly held that 'the Board was within its power in treating the whole sequence as one.' *Fant Milling, supra,* p. 307.

It is abundantly clear from the Record in this case that Respondent's activities come within the purview of Section 8(b)(4)(D) of the Act notwithstanding the fact that Respondent may also have sought other lawful objects thereby. *NLRB v. Operating Engineers, Local 12* (C.A. 9), 293 F. 2d 319; *NLRB v. Denver Building Council,* 341 U.S. 675; *Electrical Workers v. NLRB,* 341 U.S. 694, 700; *NLRB v. Lithographers* (C.A. 9), 309 F. 2d 31; *Department*

Store Employees v. Brown (C.A. 9), 284 F. 2d 619, 623.

CONCLUSION

It is respectfully submitted that the decision and order of the National Labor Relations Board concluding that jurisdiction over the transportation of electrical supplies utilized by the electricians in the performance of their work belongs to electricians rather than the teamsters represented by Respondent and that Respondent's picketing and other activities directed toward the reassignment of that work from the electricians to employees represented by the Respondent violate Section 8(b)(4)(D) of the Act is supported by substantial evidence and is not arbitrary or capricious. *NLRB v. International Longshoremen's and Warehousemen's Union* (C.A. 9, 1967), 373 F. 2d 33. Therefore, the petition of the National Labor Relations Board for enforcement of its Order should be granted.

Dated, San Francisco, California,
September 21, 1967.

Respectfully submitted,
CARROLL, DAVIS, BURDICK & MCDONOUGH,
PHILIP PAUL BOWE,
THORNTON C. BUNCH, JR.,
Attorneys for Intervenor.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Philip Paul Bowe,
Attorney for Intervenors.

No. 21,523

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ALLISON W. BROWN, JR.,
Attorney,

National Labor Relations Board.

INDEX

AUTHORITIES CITED

Cases:

Cases—Continued Page

Statute:

In the United States Court of Appeals
for the Ninth Circuit

No. 21,523

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order issued against respondent ("Teamsters") on April 12, 1966, pursuant to Section 10(c) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). The Board's deci-

sion and order in the unfair labor practice proceeding (R. 57-58)[1] are reported at 157 NLRB 1621. The Board's earlier decision and determination of dispute in the underlying Section 10(k) proceeding (R. 73-84) are reported at 150 NLRB 504. This Court has jurisdiction of the matter, the unfair labor practices having occurred within this judicial circuit at the Nevada Test Site of the Atomic Energy Commission.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly stated, the Board found that the Teamsters engaged in conduct proscribed by Section 8(b)(4)(i) and (ii)(D) of the Act,[2] with an object of forcing or requiring REECO to assign work in dispute to employees represented by the Teamsters rather than to employees represented by the International Brotherhood of Electrical Workers ("IBEW"). Earlier, in the Section 10(k) proceeding, the Board rendered an

---

[1] References to the pleadings, the Board's decision and determination of dispute, the Board's decision and order, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to the portions of the stenographic transcript of the Section 10(k) proceeding reproduced pursuant to Court Rule 10 are designated "Tr." The abbreviations "T. Exh.," "IBEW Exh.," "REECO Exh.," and "Bd. Exh." refer respectively to exhibits introduced at the 10(k) hearing by the Teamsters, International Brotherhood of Electrical Workers ("IBEW"), Reynolds Electrical & Engineering Company, Inc. ("REECO") and the Board. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 39-40.

affirmative award of the disputed work to REECO's employees represented by the IBEW, thereby determining that the Teamsters' members were not entitled to the work.

A. *Background of the dispute*

Since 1951 the Atomic Energy Commission ("A.E.C.") has conducted nuclear testing at the Nevada Test Site ("N.T.S."). N.T.S. consists of an area in excess of 1500 square miles and is sometimes referred to as "Mercury," although in actuality Mercury is the headquarters and point of entry to N.T.S. from the city of Las Vegas. N.T.S. has been divided into administrative areas numbering more than 15 since 1961. During this recent period, Areas 3 and 9 have been principal centers of activity (R. 19-20; Tr. 742-743).

Reynolds Electrical and Engineering Co. Inc. ("REECO") has been prime contractor at N.T.S. since December 1952 and has performed various types of construction, support and service work in connection with the nuclear testing (R. 19; Tr. 1882).

1. *Agreements between the Teamsters and IBEW and the practice thereunder*

In 1942, the parent International unions of the disputing locals involved herein entered into an agreement dealing with their respective jurisdictions which provided in relevant part (R. 21; T. Exh. 6-B):

> It is further agreed that the operators of vehicles used for electrical construction work, maintenance work, or electrical repair work—that is,

> when such vehicles are used for transporting man or men and/or material to and from job, and said vehicle remains at jobsite with man or men in the performance of electrical work, and the operation of the vehicle is an integral part of this work—such operator comes under the jurisdiction of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS.
>
> It is understood and agreed that the equipment operated by electrical workers shall only be the truck carrying the line and maintenance crews, tools, etc., to and from the job, or the emergency car from electrical contracting shops carrying only tools and repair equipment for emergency work. Operation of all delivery equipment for the delivery of materials of all character, such as poles, pipes, transformers, cables, and electrical appliances, such as refrigerators, radios, etc., shall be the jurisdiction of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS.

In 1952, a jurisdictional dispute between the Teamsters and IBEW arose at N.T.S. over the staffing of a warehouse and yard located at Mercury. This warehouse was used exclusively to store electrical materials. In addition, a dispute arose over the hauling of these materials from the warehouse to the points of use (R. 21; Tr. 1035-1037, 1693-1694, 2307, 2319-2320). William F. Carter, secretary-treasurer of the Teamsters and Ralph A. Leigon, business manager of the IBEW, attempted to resolve the dispute by applying the agreement set forth above (referred to in the record as the Greenbook Agreement). This Carter-

Leigon Agreement provided in relevant part (R. 21-22; T. Exh. 6-A):

> The mutual understanding as to the interpretation of the existing [Greenbook] agreement, copy of which is attached, between the two International Unions was determined as follows:
>
> *Paragraph #2*: Crew or Line Truck referred to in this paragraph shall be loaded by Warehousemen if available, or composite crew, at the start of the shift, and operated by I.B.E.W. men. All other materials required during the shift other than first loaded as above, shall be requested from the warehouse or yard and delivered by vehicle operated by Teamsters.
>
> It was further mutually agreed that a composite crew of Warehousemen and Electricians shall work together in the Warehouse storing electrical material exclusively. One to one ratio between the two crafts shall be maintained as equally as possible.

Although not a party thereto, REECO abided by the terms of this agreement. In the warehouse in which only electrical materials were stored, REECO assigned the work of receiving, storing and loading these materials to a composite staff of employees represented by the Teamsters and IBEW (R. 76; Tr. 1816).[3] With respect to the hauling of electrical ma-

---

[3] Within a year, this provision for composite staffing became moot because the warehouse storing only electrical materials was converted to a mixed materials warehouse where the Teamsters had exclusive jurisdiction (R. 76; Tr. 1816-1817, 2224).

terials and supplies from warehouses[4] to points of use or to forward compounds,[5] REECO assigned this work, except for the first load of the shift, to the Teamsters. The "first load" hauling was assigned to IBEW members (R. 20, 22; Tr. 1063-1064, 1824, 2429).

2. *The development of forward compounds*

Between 1952 and October 1958, the nuclear testing at N.T.S. was conducted above ground. A moratorium on all nuclear testing was imposed from the latter date until September 1961. From September 1961 on, all testing has been conducted underground, usually in wellholes and occasionally in tunnels (R. 19; Tr. 570, 1277-1280).

This change in the method of testing produced a change in the nature of REECO's operations. During the period of atmospheric testing, the wide-range destructive effect of the tests precluded the development of any permanent work buildings near the testing. Most materials were stored and fabricated in warehouses, hauled to the point of utilization and used immediately (Tr. 570, 1146-1147, 1362, 1380-1381). Some electrical work was performed in portable shacks in the forward areas which were moved

---

[4] By 1962 REECO had developed five permanent warehouses storing mixed materials and staffed by Teamsters (R. 20; 10(1) Tr. 57-59). ("10(l) Tr." references are to portions of the stenographic transcript of the Section 10(l) proceeding introduced at the Section 10(k) hearing as Board Exhibit 4).

[5] See pp. 7-8, *infra*.

prior to the nuclear tests (R. (D&D 9); Tr. 2489-2494, 2531-2532, 2541). With the termination of atmospheric testing, however, REECO developed forward staging compounds proximate to the point of testing. These forward compounds are, in turn, subdivided into smaller craft compounds occupied by a specific craft. The craft compounds are sometimes fenced for security reasons and for the preservation of materials (R. 20; Tr. 404, 10(l); Tr. 82). In addition to trailer offices for area and craft superintendents, the forward compounds contain facilities for the fabrication or assembly of materials and structures prior to their transportation for use in well-holes and tunnels (R. 20; Tr. 349-352).

As stated *supra*, p. 6, except for the "first-load" of the shift, Teamsters haul electrical materials from one of REECO's five permanent warehouses to the forward electrical compounds. These materials are always delivered pursuant to a specified work order and are unloaded by IBEW members at the electrical compounds (R. 20; Tr. 360-363, 403, 582). Laborers, and if a forklift is needed, operating engineers, sometimes assist in the unloading (R. 20; Tr. 2532-2533, T. Exh. 13, Finding of Fact 2). Eighty to 90 percent of these materials are fabricated in some manner at the compound (R. 20; Tr. 408, 594). For example, in an electrical compound located in Area 3, coaxial cable is spliced and fixtures are attached to the cable ends (R. 20; Tr. 353-354). Following a brief storage period, generally less than two or three months, the materials are transported a short distance from the electrical compound to the point of use

(Tr. 653-654, 777). In the case of Area 3, there are approximately 25 well-holes within a three mile radius of the compound (R. 20; Tr. 356-357). No inventory is kept of the materials stored in these forward electrical compounds (Tr. 404-405).

B. *The work in dispute*

The dispute involves two kinds of work. The first involves the staffing of the forward electrical compounds. The men assigned there unload electrical materials and supplies and check, tally, place or "spot" these materials within the compound. This issue is referred to hereinafter as the "composite staffing" dispute.

The second matter in dispute involves the subsequent loading of electrical materials and supplies at the forward electrical compound and the hauling of these materials to the point of utilization. This issue will be referred to as the "hauling to point of use" dispute.

C. *The Teamsters claim the disputed work and attempt to compel REECO's assignment of the work to its members*

In November 1963, Teamster officials Dale Thompson, William Carter and Joe Carter protested to REECO officials that electricians represented by the IBEW were improperly hauling electrical materials from the forward electrical compounds to the points of use. The Teamsters claimed that the IBEW members' use of flat rack trucks for this purpose constituted a violation of the Carter-Leigon and Greenbook

agreements. On November 18, 1963, Carter wrote to REECO listing a number of flat racks used by the electricians in Areas 3 and 9 and threatening "to take the necessary steps to protect our rightful jurisdiction" (R. 22; T. Exh. 10, Tr. 789-792, 1027, 1029, 1417-1419, 1682-1683, 10(l) Tr. 83-85, 91).[6]

In the ensuing months, meetings between officials of REECO and the Teamsters failed to resolve the differences between the parties and Carter decided to submit some of the issues to the Joint Conference Board ("AGC Board")[7] (R. 23; T. Exh. 11). The IBEW was not a party to the proceeding (R. 30). On April 1, 1964, REECO officially answered Carter's letter of November 18, 1963, denying that the IBEW's members' hauling of electrical materials in flat rack trucks violated the Carter-Leigon and Greenbook agreements and concluding that the "accusation

---

[6] About this time the Teamsters also protested REECO's use of a "non-manual clerk" in an Area 9 compound containing mixed materials. This dispute, which is not relevant to the instant dispute involving exclusively electrical compounds, produced a letter by Carter to REECO official C.E. Lemon on January 8, 1964, and a visit by Carter and Lemon to Area 9 in February or March. Though Lemon promised that a Teamster receiving clerk would be assigned to work in Area 9, it does not appear that a change in work assignment occurred (R. 22-23; REECO Exh. 1, Tr. 2039, 2042, 2050).

[7] The Teamsters' submission to the AGC Board was based on the 1962 Associated General Contractors labor agreement (T. Exh. 5) to which the Teamsters and REECO were signatories. Article V of the agreement provided procedures for settlement of grievances and disputes. IBEW was not a signatory to this labor agreement and did not participate in the proceedings before the AGC Board (R. 23).

of jurisdictional violation is unfounded" (R. 23; T. Exh. 12).

About April 20, 1964, Carter and Lou Groeniger, a representative of the A.E.C., toured N.T.S. As they drove up to an electrical compound in Area 17, Carter observed eight electricians loading a pickup truck. In addition, two flat rack trucks driven by Teamsters were waiting to be unloaded. Carter immediately contacted REECO representatives Cook and Taylor and insisted that there should be an equal number of Teamsters and electricians in the compound loading and unloading materials. Carter argued that the electrical compound was a warehouse within the meaning of the Carter-Leigon Agreement and that, accordingly, REECO was required to utilize composite crews for these operations. Taylor disagreed, contending that the electrical compound was part of the job site (R. 23-24; Tr. 2061-2068). Carter responded by instructing the Teamster drivers of the two flat rack trucks to return their loads to the warehouse. As Carter testified: "[The two drivers] were going to stay back there until such a time as they put a composite crew to unload, and I told [Taylor] if he fired one man that I was going to take the rest of them home" (R. 24; Tr. 2066).

That evening Carter instructed his business agents to order the cessation of Teamster deliveries to all forward compounds (R. 8).[8] The following day, April 21, Carter met with REECO officials Lemon and Crockett at the offices of A.E.C. Representative

---

[8] See *infra*, p. 35, for a discussion of the Board's resolution of conflicting evidence in support of this finding.

Groeniger. Carter stated that the Teamsters' actions were intended solely to force REECO's compliance with the Carter-Leigon Agreement, and pending such compliance, the Teamsters would not deliver materials to the electrical compounds. The Teamsters and REECO had been unable to settle any differences for "quite some time," Carter added, and the Teamsters "felt that the only way of bringing the matter to a head was to take drastic action . . ." (R. 25; Tr. 2071-2073).

On April 22, Carter sent a telegram to the Joint Council of Teamsters and Teamster International officials requesting the right to strike REECO. The telegram read in part (R. 28-29; T. Exh. 41):

> REECO PRIME CONTRACTER [sic] FOR AEC TEST SITE IS IN VIOLATION OF THE AGC MASTER AGREEMENT THEY HAVE REFUSED TO CORRECT THE VIOLATIONS CONSTANTLY USING PEOPLE OTHER THAN TEAMSTERS TO HANDLE AND HAUL MATERIAL. . . . TIME WILL NOT PERMIT THE PROPER PROCEDURES FOR REQUESTING STRIKE SANCTION.

Commencing April 24, Teamster drivers refused to deliver or unload materials at the forward compounds (R. 25; Tr. 269, 405-407). As REECO's warehousing supervisor, Williams Boggs, testified, Teamster steward Pat Gwinn informed him on April 27 that the Teamsters "would not deliver material to any compound where there was not a Teamster clerk to receive it, or a Teamster forklift operator to unload it" (R. 25; 10(l) Tr. 138-139). Moreover, these refusals were not limited to materials utilized by elec-

tricians; Teamster drivers also ceased deliveries intended for plumbers, carpenters, laborers, drillers and ironworkers (R. 25-26; Tr. 270, 282-288, 10(l) Tr. 139-140). REECO sought to stop the refusals on April 27 by warning ten Teamster drivers of possible disciplinary action if they returned to the warehouse with loaded trucks. Nevertheless, each driver returned with a loaded truck (R. 26; Tr. 276-279).

The following morning, April 28, Carter met with REECO officials who promptly advised him that further refusals by Teamster drivers would result in disciplinary action against the employees involved. Carter answered that he had instructed the drivers not to unload materials in the forward compounds unless Teamsters unloaded these vehicles. In this statement, Carter failed to restrict his remarks to the electrical compounds (R. 26-27; Tr. 307-310, 377-378, 392-393). When Carter noted that the AGC Board was meeting in executive session at 2:00 p.m. and that the AGC Board deliberations might assist in resolving their dispute, the parties adjourned until late in the afternoon (R. 27; Tr. 309). When they met again, Carter reported that the AGC Board had "ruled against Reynolds." The meeting adjourned to give REECO's officials an opportunity to study the AGC Board's conclusions (R. 27; Tr. 310).

The Teamsters' refusals to deliver and unload materials ceased on April 29 (R. 10; Tr. 288). The AGC Board's award officially issued on April 30. The AGC Board first recited the positions of the two parties (R. 35; T. Exh. 13, page 1):

> Mr. Carter stated that it was the Union's position that the Company was in violation of the Agreement . . . because I.B.E.W. personnel were being used to perform duties involving warehousing, handling and transporting materials from area yards to job sites. . . . Messrs. Goodwin and Hawley [for REECO] contended that the area yards were properly to be considered as part of the job site and that once material was delivered to such yards it then was to be handled and transported by the craft that would make the installation.

The AGC Board's conclusions reflected a partial agreement with Carter's position. Thus, with respect to the "hauling to point of use" dispute (see p. 8 *supra*) the AGC Board held that REECO's assignment of work conflicted with area practice and therefore violated the labor agreement to which REECO and the Teamsters were signatories (T. Exh. 13, Conclusion 2; see T. Exh. 5, Article III F for the contract provision specifically involved). However, Carter failed to prevail on the "composite staffing" dispute. As the AGC Board stated (T. Exh. 13, page 2, para. 6):

> Management representatives refused to find a violation of the agreement insofar as the warehousing function was concerned because they took the position that since electrical fabrication was being performed at the various yards visited these locations could properly be considered as electrical shops rather than as warehouses and it was in keeping with trade practice in the area

that such shops be manned by electrical personnel.[9]

On May 1, one day after the issuance of the AGC Board award, Carter met with REECO officials. In Carter's view, the AGC Board had held that "all forward compounds were to be treated as warehouses, that [REECO was] to install warehouse clerks and that all hauling from these compounds were to be done by Teamsters" (R. 27; 10(l) Tr. 150-151). When REECO Representative Lemon stated that the award applies only to electricians, Carter answered: "No, this applies to everybody" (R. 27; 10(l) Tr. 151). In response, REECO's officials asserted that the award was "unclear," that a clarification would therefore be sought from the AGC Board, and that pending such clarification no change in work assignment would occur (R. 27; 10(l) Tr. 150, 153).

The AGC Board's certification issued on May 6 stated in part: "The award . . . applies solely to work being performed by the Electricians and no other craft" (R. 27; T. Exh. 15).

Meanwhile, on May 4, Leigon, business manager of IBEW, had requested a meeting of the Joint Conference Committee ("NECA Committee")[10] for the pur-

---

[9] The AGC Board refused to recognize the Carter-Leigon Agreement because the Teamsters and the IBEW had failed to follow certain procedures necessary for recognition of the agreement under various sections of the "master" labor agreement (T. Exh. 13, Finding of Fact 7, Conclusion 1).

[10] REECO was a signatory to a contract between the IBEW and the Southern Nevada Chapter of the National Electrical Contractors' Association (IBEW Exh. 4). The NECA Com-

pose of investigating "the proper assignment of the handling and moving of electrical material . . ." (IBEW Exh. 2-B). Following this investigation, the NECA Committee concluded on May 13 that REECO's assignment of the work in dispute was proper. REECO's compliance with the AGC Board's award, the NECA Committee further concluded, would violate the IBEW-REECO contract and would not conform to "the long-established trade practice in this area and the past practice of the Nevada Test Site" (IBEW Exh. 2-A).

On May 11, REECO's refusal to reassign the handling and moving of electrical material became manifest to the Teamsters. Accordingly, Teamster business agents Joe Carter and Benny Batista went to REECO's main warehouse to stop Teamsters from issuing materials or hauling to the forward compounds (R. 28; Tr. 2110-2112). About this time, REECO's assistant warehouse superintendent, Carl Lavender, instructed a Teamster foreman to load and dispatch electrical materials to Area 3. Though warned of possible disciplinary action against him, the foreman decided to follow the contrary instructions of Teamster steward Merlyn Gile. Thereupon, supervisory personnel loaded and dispatched the materials (R. 28; Tr. 289-290).

Just prior to the noon lunch hour, Business Agent Batista arrived and instructed the Teamsters to sit

---

mittee is the body charged with adjudicating unresolved disputes between IBEW and the employer (IBEW Exh. 4, Article 1, Sec. 6).

down and do nothing, "not even answer the phone," upon their return from lunch. These employees then staged a sitdown strike of 1½ to 2½ hours (R. 28; Tr. 290-291). At about 2:30 p.m., REECO informed the employees that they were "off the payroll." The employees soon left the premises (R. 28; Tr. 291).

The following morning, May 12, a Teamster picket line formed at the entrance to N.T.S. and all Teamster employees remained away from work. A federal district court enjoined the picketing on May 26 (R. 28; Tr. 292, 294-295).[11]

D. *Proceedings before the Board*

On May 5, 1964, REECO filed a charge with the Board which was amended on May 11 alleging that the Teamsters had violated Section 8(b)(4)(D) of the Act, the section involving "jurisdictional disputes" (R. 3-7). Upon investigating the charge and finding reasonable cause to believe that Section 8(b)(4)(D) of the Act had been violated, the Board, under the provisions of Section 10(k) of the Act, held a hearing on the merits of the underlying work dispute. On December 16, 1964, the Board issued its

---

[11] On May 21, 1964, the Teamsters filed a complaint in the United States District Court for the District of Nevada seeking enforcement of the AGC Board's award and declaratory relief based on the Teamsters' contract with REECO. REECO then answered and the IBEW and NLRB intervened. On March 9, 1965, the Court issued an order staying the proceeding pending the instant NLRB case and any subsequent judicial review in the court of appeals (R. 19; General Counsel's Exhibit ("G.C. Exh.") 6F, introduced into the unfair labor practice hearing before the Trial Examiner).

decision and determination of dispute finding that the disputed work should be assigned to employees represented by the IBEW (R. 83). Having made this finding, the Board further held that the Teamsters were not lawfully entitled to force or require REECO to assign the work to employees represented by the Teamsters (R. 84).

The Teamsters informed the Board, by letter dated January 4, 1965, that they would not voluntarily comply with the Board's determination of the work dispute (G.C. Exh. 5). Thereupon, the General Counsel of the Board issued an unfair labor practice complaint alleging that the Teamsters had violated Section 8(b)(4)(D) of the Act (R. 7-11). At the hearing before the Trial Examiner, the parties stipulated that the record of the Section 10(k) proceeding be introduced and received into the record of the unfair labor practice proceeding (Transcript in unfair labor practice hearing, pp. 9-10).

II. The Board's Conclusions and Order

The Board, in agreement with the Trial Examiner, concluded that the Teamsters refused to deliver materials to forward compounds manned by employees of REECO represented by the IBEW and by other labor organizations, struck, threatened to strike, and induced and encouraged employees of REECO to engage in a strike or a concerted refusal to perform services—all with an object of forcing or requiring REECO to staff forward electrical compounds with employees represented by the Teamsters, thereby either causing REECO to assign Teamster employees

on a ratio of one to one with other craftsmen manning said electrical compounds or to assign said Teamster employees to the exclusion of employees represented by other craft unions. The Board further concluded that another object of the Teamsters' conduct was to force or require REECO to assign to employees represented by the Teamsters the work of driving vehicles transporting electrical supplies from forward electrical compounds to points of use. Having engaged in said conduct with these objects, the Teamsters violated Section 8(b)(4)(D) of the Act (R. 37-38, 57).

The Board's order requires the Teamsters to cease and desist from the unfair labor pratices found with respect to REECO or any other person. Affirmatively, the Board's order directs the Teamsters to post appropriate notices (R. 38-39, 58).

ARGUMENT

I. Introduction—The Statutory Framework and Standard of Judicial Review

Section 8(b)(4)(i)(ii)(D) of the Act, in relevant part makes it an unfair labor practice for a labor organization or its agents:

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce,

or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Section 8(b)(4)(D) is supplemented by Section 10 (k) which provides:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

These sections render unlawful strikes or inducements to strike aimed at forcing the reassignment to employees in one labor organization of work already assigned to members of another labor organization.

Thus, a violation of Section 8(b)(4)(i) and (ii)(D) presumes two elements: (1) the labor organization must, under subsection (i), strike, or induce or encourage employees to strike or refrain from working and, under subsection (ii), must "threaten, coerce, or restrain" any person engaged in commerce; and (2) an object of this conduct must be to force an employer to reassign work from employees in one labor organization to those in another. There is no dispute in this case about the Teamsters having resorted to conduct falling within the proscription of Section 8(b)(4)(i) and (ii)(D). Rather, the principal issue concerns the propriety of the Board's determination of the jurisdictional dispute in the Section 10(k) proceeding.

Construing Section 10(k), the Supreme Court held in *N.L.R.B.* v. *Radio and Television Broadcast Engineers Union, Local 1212*, 364 U.S. 573, (hereafter "*Local 1212*") that the Board is required to decide jurisdictional disputes on their merits. The Supreme Court stated (364 U.S. at 579):

> We agree with the Second, Third and Seventh Circuits that § 10(k) requires the Board to decide jurisdictional disputes on their merits and conclude that in this case that requirement means that the Board should affirmatively have decided whether the technicians or the stage employees were entitled to the disputed work. . . . This language [of Section 10(k)] indicates a congressional purpose to have the Board do something more than merely look at prior Board orders and certifications or a collective bargain-

> ing contract to determine whether one or the other union has a clearly defined statutory or contractual right to have the employees it represents perform certain work tasks. For, in the vast majority of cases, such a narrow determination would leave the broader problem of work assignments in the hands of the employer, exactly where it was before the enactment of § 10(k)—with the same old basic jurisdictional dispute likely continuing to vex him, and the rival unions, short of striking, would still be free to adopt other forms of pressure upon the employer.

The Supreme Court recognized that the effect of its holding would be to force the Board to exercise under Section 10(k) "powers which are broad and lacking in rigid standards to govern their application," but the Court expressed confidence that the Board, with its "long experience in hearing and disposing of similar problems," and with "a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem," would be able to meet its responsibilities 364 U.S. at 583.[12]

In following the Supreme Court's mandate, the Board has recognized that there are no rigid rules to govern its determination, but rather that Section 10

---

[12] The Court said further that "administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. It might have been better, as some persuasively argued in Congress, to intrust this matter to arbitrators. But Congress, after discussion and consideration, decided to intrust this decision to the Board." 364 U.S. at 583.

(k) is to be given content through the empiric process of administration. Accordingly, in *International Association of Machinists, Lodge 1743 (Jones Construction Co.)*, 135 NLRB 1402, a case coming to the Board shortly after the *Local 1212* decision, the Board adopted the following approach to the task of specifically rendering affirmative awards in jurisdictional dispute issues (135 NLRB at 1410-1411):

> At this beginning stage in making jurisdictional awards as required by the Court, the Board cannot and will not formulate general rules for making them. Each case will have to be decided on its own facts. The Board will consider all relevant factors in determining who is entitled to the work in dispute, e.g., the skills and work involved, certifications by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards and the AFL-CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer's business. This list of factors is not meant to be exclusive, but is by way of illustration.

As such Section 10(k) determinations come before the courts of appeals for review, the governing standard of review must necessarily be whether or not the Board has abused its discretion—that is, whether the Board has been arbitrary or capricious—in making a particular work assignment. This is implicit in the Supreme Court's emphasis in *Local 1212* that Congress has, in Section 10(k), committed to the Board a task which necessarily involves a wide degree of

discretion and expertise in an area where the Board's "powers . . . are broad and lacking in rigid standards to govern their application." 364 U.S. at 583. Accord: *N.L.R.B.* v. *International Longshoremen's & Warehousemen's Union; and Locals 6, 10, 34, 54, and 91, etc.*, 378 F. 2d 33, 35-36 (C.A. 9), pet. for cert. pending, 36 Law Week 3117; *N.L.R.B.* v. *Local 676, International Brotherhood of Teamsters, etc.*, 376 F. 2d 3 (C.A. 3); *New Orleans Typographical Union* v. *N.L.R.B.*, 368 F. 2d 755, 761-765 (C.A. 5); *N.L.R.B.* v. *Des Moines Electrotypers Union No. 84*, 291 F. 2d 381, 388 (C.A. 8).

We submit that the Board's determination herein, awarding the disputed work to employees represented by the IBEW, is reasonable and should be affirmed.

II. The Board's Determination in the Section 10(k) Proceeding That Employees Represented by IBEW Are Entitled to Perform the Work in Dispute Is Neither Arbitrary Nor Capricious

A. *The composite staffing dispute*

Consistent with its decision in *Jones Construction Co., supra,* the Board weighed several factors in determining which of the competing groups of employees should be assigned the work of unloading, checking, tallying and placing electrical materials within the forward electrical compounds. Initially, the Board considered and rejected the Teamsters' contention that the Carter-Leigon Agreement awarded the work to the Teamsters (R. 78-79). More specifically, the Board concluded that the forward electrical compounds were not "warehouses" within the meaning of

the Carter-Leigon Agreement and accordingly that the Agreement's requirement of "one to one" composite staffing was inapplicable to the dispute herein.[13] As the Board noted, the record shows that when the Agreement was signed in 1952, there existed one warehouse used exclusively for the storage of electrical materials (R. 78-79; Tr. 1694, 1798, 2283). Moreover, because of the atmospheric testing, no forward electrical compounds existed at that time (p. 6, *supra*). The Board concluded, therefore, that the parties' use of the word "warehouse" in the Carter-Leigon Agreement (p. 5, *supra*) referred only to the one electrical warehouse in existence in 1952 (R. 78-79). In addition, the record shows that the Teamsters apparently agreed with this interpretation of the term "warehouse" because they failed to protest the absence of composite staffing in the forward electrical compounds until April 1964, at least three years after the creation of the compounds in their present form (R. 79; 10(l) Tr. 39-40, Tr. 790-791). Cf. *New Orleans Typographical Union* v. *N.L.R.B.*, *supra*, 368 F. 2d at 763-764.

---

[13] The Board dismissed the contention of the Teamsters Union that its demand for one-to-one staffing with the IBEW members did not constitute a request for the reassignment of work from IBEW employees to Teamsters. As the Board reasonably concluded, the Teamsters could hardly assume that REECO would be willing to double the work force needed; the Teamsters must have contemplated, therefore, that their demand would cause IBEW members to lose jobs (R. 77). See *N.L.R.B.* v. *Local 1291, International Longshoremen's Association*, 345 F. 2d 4, 9-10 (C.A. 3), cert. denied, 382 U.S. 891; *International Typographical Union*, 121 NLRB 793, 799.

The nature of the forward electrical compounds provides further support for the Board's conclusion. As was described above p. 7, materials are always delivered to the forward electrical compounds pursuant to specific work orders.[14] No inventory is kept of these materials and 80 to 90 percent of them undergo some type of fabrication.[15] The materials rarely remain in the compounds more than two or three months before their delivery to points of use, usually a wellhole within a few miles of the compound.[16]

The Board also considered other factors in rendering an affirmative award of the composite staffing work to IBEW members. The record shows that IBEW employees have always done this work at N.T.S., in the nearby area and in the industry (R. 78; Tr. 217-218, 446, 450, 584-585, 995-1000, 1137)). Moreover, it appears that materials are generally unloaded at the compounds for no more than one or two hours each day. It is more efficient, therefore, for IBEW employees, whose normal pre-

---

[14] As is customary in the construction industry, materials are ordered in amounts which exceed requirements by 5 to 10 percent because "nothing comes in exact quantities you need it in" (R. 20-21; Tr. 487).

[15] Though the compounds are sometimes fenced, this is done to preserve the materials and for security reasons (*supra*, p. 7).

[16] As the Board noted, the points of use are relatively proximate to the compounds when compared with the size of N.T.S. (in excess of 1500 square miles) and the occasional distances of 25 to 35 miles between permanent warehouses and the wellholes (R. 79).

fabrication work is done nearby, to unload and place the materials (R. 78; Tr. 431-432, 448, 502, 2474).

Finally, the reasonableness of the Board's determination is shown by the decisions of the two arbitral entities in this case. Both the NECA Committee and the AGC Board considered the Teamsters' demand to have REECO reassign the "composite staffing" work. As stated above, pp. 14-15, the NECA Committee ruled that a change in the present assignment to IBEW would violate the IBEW-REECO contract and would not conform to the previous practice at N.T.S. and in the area. And in the AGC Board proceeding, the Teamsters' claim was rejected by the AGC Board's management representatives who concluded: ". . . since electrical fabrication was being performed at the various yards visited these locations could properly be considered as electrical shops rather than as warehouses and it was in keeping with trade practice in the area that such shops be manned by electrical personnel" (pp. 13-14, above).[17] In sum, the Board properly weighed the relevant factors and reasonably awarded the staffing work to IBEW employees.

B. *The hauling to point-of-use dispute*

In awarding the work of hauling electrical materials from the forward compounds to their point

---

[17] The Board also concluded that REECO's separate contracts with each of the two unions failed to shed light on the dispute. In addition, the record did not establish the superiority of either group of employees with respect to the skills involved in the disputed work (R. 78).

of use by IBEW members, the Board considered REECO's previous practice, the Carter-Leigon and Greenbook agreements, the contracts between the Teamsters and REECO and the IBEW and REECO, the arbitration determinations, the skills and efficiency of the competing groups of employees and a previous resolution by REECO of a dispute at an area known as the BJY.

The record is clear that since the commencement of underground testing in 1961 and the concomitant development of forward compounds, REECO has always assigned this disputed work to employees represented by the IBEW (R. 80-81; Tr. 420-421, 585, 1930-1932, 1935, 2490-2491, 2496-2499, 2533-2534). Although REECO's contracts with the two unions contained no clear-cut assignment of the work, the Board found that the Carter-Leigon and Greenbook agreements contained relevant guidelines. In essence, they provided that the Teamsters have jurisdiction over the delivery of materials from points outside of the jobsite to the first drop on the site; the IBEW employees were given the right to drive vehicles, remaining within the confines of the jobsite, which are used for the transportation of materials from one point to another during the electricians' work. The issue thus becomes whether the forward compounds may reasonably be considered a part of the jobsite. We submit that the evidence discussed above (p. 25) amply supports the Board's conclusion that the compounds are part of the jobsite. Thus, the electrical materials are always delivered to the compounds pursuant to a specific work order, and 80 to 90 of such

materials are fabricated at the compounds. And these materials remain at the compounds for a brief period, generally less than two or three months, before being transported to a wellhole a short distance away. At the very least, the Board was not arbitrary in its interpretation of the term "jobsite" as used in the Carter-Leigon and Greenbook agreements.

The decisions of the two arbitration tribunals conflicted. While the NECA Committee concluded that terminating REECO's assignment of the hauling work to IBEW members "would violate the long-established trade practice in this area," the AGC Board concluded the opposite with respect to the same area practice.[18] The Board found that no area practice existed and that N.T.S. presents a unique situation. Indeed, the record contains no evidence of a practice at construction projects of comparable size or where comparable work is being performed (R. 80; Tr. 466-468, 657, 659-660).

Although the Board found that either group of employees possessed the skills necessary to perform the disputed work, it further concluded that it was more efficient and practicable for the IBEW members to haul the electrical materials to the point of use. For example, after such hauling, the electrician could join

---

[18] The AGC Board found that REECO's award of the work to the electricians constituted a violation of Article III F of the contract between REECO and the Teamsters (T. Exh. 13, Conclusion 2, T. Exh. 5, Article III F.). However, as the Board noted, Section III, Subparagraph D of the same contract precluded the AGC Board from resolving a jurisdictional dispute, as in the instant case (R. 35).

the crew at work installing the delivered materials (R. 83; Tr. 806, 810, 756). Finally, the Board properly rejected as inapposite the Teamsters' reliance on REECO's resolution of the BJY dispute in 1957. The record shows that the BJY was an area where supplies were stored for general use and not thus pursuant to specific work orders. Since this storage area was utilized during the period of atmospheric testing, it was of necessity located many miles from the testing and point of use of the materials. Moreover, no fabrication of materials was performed there (R. 82-83; Tr. 157, 166, 1377, 1827-1828, 1891-1892).

On the basis of the foregoing, we submit that the Board was not arbitrary or unreasonable in finding, as it did, (1) that the Teamsters were not entitled to composite staffing at the electrical compounds, and (2) that electricians represented by IBEW were entitled to perform the work of driving vehicles transporting electrical supplies from the electrical compounds to the point of use. Accordingly, the Board properly assigned the disputed work to electrician employees represented by IBEW.

C. *The Teamsters' defenses are without merit*

Before the Board, the Teamsters relied on the existence of contract rights allegedly supporting their claim to the disputed work, and argued that by virtue of their filing in the United States District Court of an action seeking enforcement of the AGC Board's award and declaratory relief based on their contract with REECO, the "District Court had primary jurisdiction to determine whether or not such claimed con-

tractual rights existed, and their meaning and applicability to the current work assignment dispute" (R. 81 para. 18 (c, d)). In other words, the Teamsters argue, the mere existence of the AGC Board's award favoring the Teamsters, the alleged contractual rights and the pendency of the District Court action deprived the Board of jurisdiction to proceed with its statutory mandate under Section 10(k).

The Act and the applicable authorities compel rejection of the Teamsters' contention. In addition to the words of Section 10(k) discussed above (pp. 20-21), Section 10(a) provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . ." As the Board has stated in language quoted by the Supreme Court: "There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held." *International Harvester Co.*, 138 NLRB 923, 925-926 (quoted in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 270-271). In the *Carey* case the Supreme Court recognized that controversies may arise in which the Board and arbitrators have concurrent jurisdiction.[19] Although this overlapping jur-

---

[19] In *Carey*, IUE claimed that certain employees represented by another union were performing work which should have been performed by employees represented by IUE. 375 U.S. at 262.

isdiction can lead to inconsistent determinations, the Court expressed no doubt as to the proper resolution of such a clash (375 U.S. at 272): "Should the Board disagree with the arbiter, . . . the Board's ruling would, of course, take precedence; and if the employer's ruling had been in accord with that ruling, it would not be liable for damages under § 301 . . . . The superior authority of the Board may be invoked at any time."

Clearly, therefore, the pending District Court action did not forclose the Board from fulfilling its statutory duty to adjudicate the jurisdictional dispute.[20] Accord: *New Orleans Typographical Union* v. *N.L.R.B.*, 368 F. 2d 755, 767 (C.A. 5); *Carey* v. *General Electric Co.*, 315 F. 2d 499, 509 (C.A. 2); see also *International Brotherhood of Firemen and Oilers* v. *International Association of Machinists*, 338 F. 2d 176, 178-179 (C.A. 5).

Nor, contrary to the Teamsters' contention, did the intervention of the IBEW in the District Court proceeding constitute an agreed upon method "for the voluntary adjustment" of the "hauling to point of use" dispute within the meaning of Section 10(k), thereby depriving the Board of jurisdiction to decide

---

[20] The Teamsters emphasize (R. 5, 6-7 paras. 15-17, 18(c)) that the filing of the complaint in the District Court occurred prior to the noticing of the Section 10(k) hearing by the Board's Regional Director. Though the Supreme Court's statement that the Board's superior authority may be invoked at any time demonstrates the irrelevance of which proceeding commenced first, it to be noted that REECO's charge was filed with the Board on May 5, 1964, weeks before the filing of the District Court action on May 21.

this issue (R. 68, para. 18(e)). The original Teamster complaint, provoking intervention by the IBEW, sought enforcement of the AGC Board's award of this work to the Teamsters. Since the IBEW had not participated in this proceeding before the AGC Board, it is plain that the IBEW did not voluntarily agree to the AGC Board as arbiter (R. 30-31).[21]

Finally, the Teamsters attack the Board's jurisdiction to determine the "hauling to point of use" dispute by asserting that their coercive refusals in April to perform work (prior to the filing of REECO's charges) occurred solely in support of their position in the composite staffing dispute and not in support of their hauling to point of use demand. Since the Board's jurisdiction to commence a Section 10(k) proceeding depends on the filing of a charge, the Teamsters contend that the Board had no jurisdiction to determine the hauling to point of use issue when all the Teamsters' economic conduct with respect thereto took place in May, after the filing of REECO's charge. The Teamsters do not dispute the rule of the *Fant Milling* case [22] in which the Supreme

---

[21] It should also be noted that Section 10(k) required the parties to submit to the Board satisfactory evidence of the voluntary adjustment of the dispute or agreed upon methods for such adjustment within 10 days after notice of the filing of REECO's charge with the Board. Should the Court agree, therefore, with the Teamsters' contention regarding the IBEW's intervention in the District Court action, such intervention occurred too late to bar the Board's jurisdiction in the Section 10(k) proceeding.

[22] *N.L.R.B.* v. *Fant Milling Co.*, 360 U.S. 301, 307, 309.

Court held that a charge merely sets in motion the investigatory machinery of the Board and that the Board has jurisdiction to consider conduct subsequent to the filing of the charge of the same class as, or related to, the pre-charge conduct. What the Teamsters thus argue is that the hauling to point of use work is "unrelated" to the composite staffing tasks (R. 68-69).

The Board properly rejected the Teamsters' argument. With respect to the Teamsters' assertion that all coercive conduct prior to the filing of REECO's charges was solely in support of the composite staffing work, the record demonstrates the contrary. Thus Carter's April 22 strike request telegram to the Joint Council of Teamsters and Teamster International officials complained of REECO's "using people other than Teamsters to handle *and haul* material" (italics added, R. 35; T. Exh. 41). And when Carter submitted grievances to the AGC Board on March 30, he did not attempt to separate the two disputes; rather he complained of alleged contract violations by REECO because IBEW members were performing "handling, warehousing, and *transporting*" of materials (italics added, R. 35; T. Exh. 13). That the Teamsters' coercive conduct in April was not confined to the composite staffing issue is further demonstrated by the wording of the amended charges filed by REECO on May 11: "the purpose and object [of the Teamsters' refusals] being to force and require REECO to assign the work of (a) unloading the material . . . and (b) the transporting of such materials

from the point of such unloading . . . to [the] point of installation . . ." (R. 6). At the time of these coercive activities, therefore, the Teamsters attempted to force a change in assignments of both kinds of work. The Teamsters' present version of what motivated these refusals, we submit, is no more than an afterthought designed for the purpose of avoiding responsibility for the Union's unlawful conduct.

Finally, we submit that it is patently artificial for the Teamsters to contend that the work of unloading, checking and placing of electrical materials in the forward compounds is of a different class and unrelated to the work of transporting these same materials from the forward compounds to the points of use. Considering the vast size of N.T.S. and the very different types of work engaged in by the separate crafts, it was surely not unreasonable for the Board to conclude that the job of unloading and checking of materials at one point was related to the work of transporting them to another point.

III. The Board's Order Is Valid and Proper

As stated above, the Board's order essentially requires the Teamsters to cease and desist from the unfair labor practices found, as recited in the Board's Conclusions of Law (R. 37-39, 57-58). The Teamsters challenge these underlying conclusions and therefore seek modification of the Board's order (R. 69-71). The record, however, supports the Board's conclusions and its remedial order, as we now show.

The Board found that the Teamsters' refusals to deliver materials from April 24 to April 29, 1964, was not confined to electrical materials destined for forward electrical compounds. Although the record conflicts on the question of whether Carter broadly instructed Teamsters on or about April 20 to refuse deliveries to electrical and nonelectrical compounds, the Board resolved this conflict in favor of the broad interpretation of his instructions for two reasons: Carter's subordinates so interpreted the instructions; for example, Teamster steward Pat Gwinn informed REECO's supervisor William Boggs on April 27 that the Teamsters "would not deliver material to any compound where there was not a Teamster clerk to receive it, or a Teamster forklift operator to unload it" (R. 24-25; 10(l) Tr. 138-141, 124-125, 129-130); in addition, the record is clear that the Teamsters did not limit their refusals to electrical materials for they ceased deliveries intended for plumbers, carpenters, laborers, drillers and ironworkers (R. 25-26; Tr. 270, 282-283, 10(l) Tr. 139-140). Further, Carter met with REECO officials on April 28 and related that he had instructed his drivers not to unload materials in the forward compounds unless Teamsters unloaded the vehicles, thus failing to restrict his remarks to the electrical compounds (R. 26-27; Tr. 307-310, 377-378, 392-393). Finally, on May 1, after the AGC Board decision had issued, Carter took the position with REECO officials that the AGC Board's conclusions applied to "all forward compounds . . . , that [REECO was] to install warehouse clerks and all hauling from these compounds were to be done by

Teamsters" (R. 27; 10(l) Tr. 150-151).[28] The Board could thus reasonably conclude that the Teamsters intended to and in fact did refuse to deliver materials to both electrical and nonelectrical compounds and that they should be required to cease and desist therefrom.

Contrary to another Teamster assertion, the record shows that some employees other than IBEW members worked at the forward electrical compounds. Thus, when materials are unloaded at these electrical compounds, laborers, and if a forklift is needed, operating engineers, sometimes assist in the unloading (R. 20; Tr. 2532-2533, T. Exh. 13, Finding of Fact 2). It was proper, therefore, for the Board to conclude (and to require the Teamsters to cease and desist therefrom) that the Teamsters engaged in coercive conduct with an object of forcing REECO to assign Teamsters to the electrical compound jobs, with the necessary consequences of reducing work available for IBEW members, laborers or operating engineers.

Finally, it was reasonable for the Board to insert the phrase "or any other person" wherever REECO is mentioned in the order. Since the order is tailored to the precise facts of this dispute at N.T.S., a dispute which is unique to the setting of N.T.S. (see pp. 3, 8, *supra*), the addition of the words "any other person" simply means that the Teamsters cannot use coercive and unlawful means to force or require any

---

[23] The AGC Board's clarification issued on May 7 and stated that the "award . . . applies solely to work being performed by the Electricians and no other craft" (R. 27; T. Exh. 15).

successor employer to REECO at N.T.S. to assign the work in dispute to the Teamsters. Inclusion of the quoted phrase in the Board order is proper where, as in this case, the party against whom the order is directed has demonstrated a proclivity to violate the Act in pursuance of an overall plan to compel the assignment of work to employees that it represents. See *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, 437; *Truck Drivers & Helpers Local Union 728* v. *N.L.R.B.*, 332 F. 2d 693, 697 (C.A. 5), cert. denied, 379 U.S. 913; *Bakery Wagon Drivers, etc. Local 484* v. *N.L.R.B.*, 321 F. 2d 353, 358 (C.A.D.C.); *N.L.R.B.* v. *Local 138, International Union of Operating Engineers*, 377 F. 2d 528-530 (C.A. 2).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should be entered enforcing the Board's order in full.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ALLISON W. BROWN, JR.,
Attorney,

National Labor Relations Board.

November 1967.

Certificate

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conform to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Unfair Labor Practices

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Limitations

Sec. 10(k) Whenever it is charged that any person has engaged in an unfair labor practice within the

meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 282309 411

No. 21,523

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Respondent.

BRIEF FOR RESPONDENT.

ROBERT L. REID,
P.O. Box 1870,
305 Wall Street,
Las Vegas, Nevada 89101,
Attorney for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases Page

Rules — Page

Statutes

No. 21,523

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Respondent.

BRIEF FOR RESPONDENT.

Jurisdiction.

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order issued against respondent ("Teamsters") on April 12, 1966, pursuant to Section 10(c) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). The Board's decision and order in the unfair labor practice proceeding (R. 57-58)[1] are reported at 157 NLRB 1621. The Board's

---

[1]References to the pleadings, the Board's decision and determination of dispute, the Board's decision an order, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to the portions of the stenographic transcript of the Section 10(k) proceeding reproduced pursuant to Court Rule 10 are designated "Tr." The abbreviations "T. Exh.," "IBEW Exh.,"

(This footnote is continued on the next page)

earlier decision and determination of dispute in the underlying Section 10(k) proceeding (R. 73-84) are reported at 150 NLRB 504.

Statement of the Case.

On February 27, 1952, while the Nevada Company was the prime support contractor for AEC at the test site, and before this function was taken over by REECO in December 1952, an agreement allocating work tasks involved in the warehousing and transportation of electrical materials was negotiated between international representatives of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers (IBT) and of the International Brotherhood of Electrical Workers (IBEW) (T Exhibits 6A and 6B), and was executed upon their direction by William F. Carter, Secretary-Treasurer of Teamsters Local #631 and Ralph A. Leigon, Business Manager of Electricians Local #357.

The immediate circumstances which gave rise to the Carter-Leigon agreement were these: The Nevada Company was doing its electrical work at the test site through a subcontractor, Newberry Electric, which had set up a warehouse and yard at Mercury, Nevada, devoted exclusively to the warehousing of electrical material. Electricians were receiving, spotting, and issuing these materials, and delivering the materials by work trucks from the warehouse to points of fabrication and use in the forward areas. The teamsters pro-

---

"REECO Exh.," and "Bd. Exh." refer respectively to exhibits introduced at the 10(k) hearing by the Teamsters, International Brotherhood of Electrical Workers ("IBEW"), Reynolds Electrical & Engineering Company, Inc. ("REECO") and the Board. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

tested this as an assignment of work covered by their traditional jurisdiction and their contract to another craft. At the instance of the Nevada Company, the two Internationals sent in representatives, who, after an on-the-spot investigation, directed the local union officials to execute the Carter-Leigon Agreement (Tr. 1798, *et seq.*); (Tr. 1018, *et seq.*).

It will be observed that the Carter-Leigon Agreement:

1. Was an agreement between the two local unions, pertaining specifically to work at the "Nevada A.E.C. Test Site."

2. It was not limited to any particular employer, but was intended to cover the entire test site and all operations carried on there by any employers employing Teamsters and Electricians, (Tr. 1045; Tr. 1813; Tr. 1707).

3. It incorporated, by physical attachment and reference, the February 11, 1942 agreement between the IBT and the IBEW (T Exh. 6B). This agreement awarded *general jurisdiction over the delivery of electrical materials to the Teamsters,* but recognized an *exception* in the case of vehicles which carry the electrical work crew and material to the job site where the vehicle remains at the jobsite with the men in the performance of electrical work and is an integral part of the work. In other words, it defined the types of vehicles which electricians might use in terms of their function.

4. The Carter-Leigon agreement provided that such vehicles, referred to as "crew or line" trucks, shall be loaded by either Teamster warehousemen or by a composite crew of Teamsters and Electricians at the start

of the shift, and when so loaded should be operated by an electrician, but that all materials required during the shift "other than loaded as above" shall be requested from the *"warehouse or yard"* and delivered by vehicles operated by Teamsters. In other words, the Carter-Leigon agreement further restricted electricians by providing that even where work trucks were used, they might carry materials only on the first load of the shift.

5. The Carter-Leigon agreement further provided that in warehouses where electrical material was stored exclusively, there should be a composite crew of Teamster Warehousemen and Electricians, as nearly as possible on a one to one ratio, storing electrical material. This was, apparently, a *quid pro quo* for the restriction placed on electricians after the first load of the shift—since by this provision Teamsters conceded the right of electricians to participate in warehousing work in warehouses where electrical materials were stored exclusively.

The evidence shows that a number of months after the signing of the Carter-Leigon agreement, both the employer and the two unions adhered to the agreement—there was composite staffing of the electrical warehouse and yard, and teamster truckdrivers delivered materials other than on the first load of the shift transported by work trucks driven by electricians.

After REECO became prime support contractor in December 1952, it commenced building a permanent warehouse complex at Mercury, Nevada, about three quarters of a mile inside the main gate at the test site (REECO Exh. 42). REECO's warehousing operation was placed under the Supply Department. The General

Stores Division of the Supply Department handled all materials and supplies (with the exception of Equipment Parts) in mixed warehouses storing materials and supplies used by plumbers, carpenters, sheetmetal workers, ironworkers, painters and laborers, as well as those used by electricians. In other words, in its permanent warehouses at Mercury, as well as in the permanent warehouses established after 1958 at Area 12 (REECO Exh. 46), Well 3 Yard (REECO Exh. 42), and Warehouse C (REECO Exh. 44), REECO did not maintain a separate warehouse for storage of electrical materials only (Tr. 908; Tr. 1049).

REECO, though not a prime support contract until December 1952, had been a contractor for AEC at the test site since 1948. As such, and by virtue of its membership in the Southern Nevada Chapter, Associated General Contractors of America, Inc. (AGC), ever since 1948 REECO had been a party to a series of collective bargaining agreements between the AGC and the local building trade unions, covering all contractors in the construction industry in Southern Nevada (REECO Exh. 5). Teamsters Local #631 was a party to these agreements. After the IBT left the AFL-CIO and the local building and construction trades council, the Teamsters entered into separate agreements with the AGC. The current agreement between Teamsters Local #631 and AGC, to which REECO is a party, (herein called "AGC Agreement"), bears the effective date of June 1, 1962 and expires May 31, 1965 (T Exh. 5). Consequently, REECO was a party to collective bargaining agreements with Teamsters, both at the time of the making of the Carter-Leigon Agreement, and concurrently.

REECO learned of the Carter-Leigon Agreement at the time it was made, or at least shortly after becoming prime support contractor in December, 1952, (Tr. 1883). It is undisputed that REECO recognized and adhered to the provisions of the Carter-Leigon Agreement at all times since* (with periodic lapses and reaffirmances, as hereinafter noted). Indisputably, the Carter-Leigon Agreement was followed by REECO with respect to the assignment of the work of warehousing electrical materials at the permanent warehouses of its Supply Department and the delivery of such materials to forward area electrical shops and points of use (Tr. 1859; Rogers, Tr. 1906; Tr. 1051). Since, under its mode of operation, electrical materials were stored in mixed-material warehouses, there was no occasion to invoke the composite warehouse staffing arrangement contained in the last paragraph of the Carter-Leigon Agreement. Teamster warehouse clerks received and issued electrical materials at the Supply Department warehouses and yards. Teamster warehousemen and forklift operators off-loaded, placed, and loaded such materials, and Teamster truck drivers, assigned from the Teamster Motor Pools for Supply Department work, delivered electrical material by truck from the Supply Department warehouses and yards to forward area electrical shops and points of use. This was also the practice with respect to materials used by plumbers, carpenters, ironworkers, sheetmetal workers, painters, cement masons, and laborers. (Tr. 528).

---

*In its decision upon the Section 10(k) phase of this proceeding, the Board found (p. 4): "The record shows that from the time of its execution REECO followed the Carter-Leigon Agreement in making work assignments, and has referred to and relied upon said agreement as a basis for resolving conflicts which arose between Teamsters and IBEW."

The only exception was that electricians would carry their own electrical materials by work truck on the first load of the shift, as provided in the Carter-Leigon Agreement.

It should be borne in mind in this connection that forward area "compounds" of the size, scope, and permanence of those now existing in Area No. 3 (REECO Exh. 6) and Area No. 9 (REECO Exhs. 24 and 33) did not come into existence until the lifting of the test moratorium in September 1961. The evidence shows that during the earlier period before the commencement of the tunnel testing program in 1958 and of the underground testing program thereafter, material stockpiles in the forward areas were kept at a minimum and 50%, or more, of all materials were delivered directly to the points of use where they were fabricated and installed by the crafts (including electricians)—(Tr. 564), and that the remaining materials which were delivered to forward area craft shops for fabrication remained there just long enough to be fabricated and then sent out to the point of use. There was little or no storing or stockpiling of materials in the forward areas for future use.

Although, generally speaking, REECO adhered to the Carter-Leigon Agreement, there was a gradual whittling away of its provisions by electricians seeking to expand their work assignments at the expense of the Teamsters (Tr. 156, 160; Tr. 1460, 1463; Tr. 1269). Teamsters would protest these practices to REECO, REECO would correct the condition and the situation would "simmer down", only to "steam up" again at a later occasion (Tr. 163).

A critical point was reached in the Spring of 1957 (Tr. 162). Electricians began to order out large quan-

tities of materials from the general warehouses at Mercury to their electrical shop in Mercury and would then transport these materials to forward areas in their work trucks (Tr. 157). The Electricians also established an electrical "storage depot" (forerunner of the present-day electrical compounds) at a forward area known as the "Y" or "BJY", located about 27 miles out of Mercury (Tr. 156-166). From this depot they would transport electrical materials in their work trucks to various points of use in adjoining forward areas (Tr. 156-166) There were also violations by electricians of the first load of the shift provision of the Carter-Leigon agreement (Tr. 157; Tr. 1885; Tr. 1405).

To protest these practices, the Teamsters engaged in a work stoppage commencing May 9, 1957. REECO sent two of its Vice-Presidents, Clark and Brennan, to survey the situation. Both men appeared at a membership meeting of Teamsters Local 631 held on or about May 11, 1957 and gave assurance that the problem would be resolved to the satisfaction of the Teamsters and requested the Teamsters to return to work. (Tr. 1837; Tr. 1407, 1408). A Memorandum of Understanding was signed May 11, 1957 (T Exh. 20), and the Teamsters returned to work on Monday, May 13, 1957. The two REECO Vice-Presidents continued to survey the situation, and, ultimately, on their instructions, L. J. Reynolds, Jr., assistant project manager, wrote a letter on June 15, 1957 setting forth the work assignments (T Exh. 7).

Paragraph 5 of this letter shows REECO's recognition of the Carter-Leigon agreement. All of the 1942 General Presidents' Agreement is quoted verbatim, as

well the first two paragraphs of the Carter-Leigon Agreement. The wording of this paragraph clearly shows that REECO recognized that the generality of the handling and hauling of electrical materials was Teamster work, and that under the Carter-Leigon agreement "electricians are *permitted* to handle and haul material *on the first* trip of the day" only. The composite staffing provisions of the Carter-Leigon agreement was not quoted, for the obvious reason that at that time there were no electrical warehouses recognized as such. Consequently, warehousing of electrical materials in mixed warehouses was implicitly recognized as Teamster work.

Paragraphs 3 and 6 are also significant. Paragraph 3 recognizes that fabricated material taken from electrical and other craft shops is *loaded* by the craft in question. However, Paragraph 3 does not state that such material is to be *hauled* to the point of use by such craft, and, read together with Paragraph 5 would, therefore mean (so far as pertains to the electricians), that electricians may haul such material on the first trip of the day only.

As to the other crafts—plumbers, carpenters, ironworkers, and the like—the evidence is overwhelming that teamsters assigned to the forward areas in question have normally hauled both fabricated and unfabricated materials from the craft shops to the points of use, including the first load of the shift, with loading at the shop and off-loading at the point of use being accomplished by the craft in question, or by operating engineers when power equipment was required.

Paragraph 6, read in juxtaposition to Paragraphs 5 and 3, makes it clear that the "first load of the shift" limitation is placed only upon electricians doing construction work, and that there is no similar restriction upon maintenance crews.

After making its work assignment award on June 15, 1957 (T Exh. 7), REECO proceeded to take corrective action. It took away a large number of vehicles from the electricians which had previously been assigned to them (Tr. 1840, 1857; Tr. 1917), and required electricians to leave their work trucks in the forward areas and ride Teamster-driven buses from their reporting points to their jobsites, as the other crafts had been doing for some time (Tr. 1840; Tr. 1907; Tr. 1449, 1458, Tr. 1390-1393). REECO also began to enforce again the "first load of the shift" provision of the Carter-Leigon agreement. A teamster warehouse clerk was installed at BJY about a year later, (Tr. 158). Ultimately, REECO disbanded the depot at BJY altogether and moved the materials stored there to the tunnels at Area 12.

There is substantial conflict in the testimony as to the extent to which vehicles other than work trucks—in particular, unmodified flatrack delivery trucks—were assigned to electricians prior to the lifting of the test moratorium in September 1961. Substantial evidence points to the fact that there were few flatrack trucks assigned to the electricians prior to 1960 or 1961, (Tr. 163; Tr. 1455; Tr. 1295, 1269-1270; Tr. 1393-1394). Assignment of flatrack trucks to electricians was uniformly protested by Teamsters when it occurred (Tr. 1282-1287) as a violation of the Carter-Leigon agreement, upon the theory that such trucks

were essentially delivery vehicles, rather than work trucks within the Carter-Leigon definition of "crew or line trucks." In one instance, three flatrack trucks were taken away from electricians in Area 410 as a result of a Teamster protest, (Tr. 163; Tr. 1395).

Commencing in 1960, and, more particularly, since the lifting of the test moratorium in September 1961, REECO commenced to assign more and more vehicles of various types (including flatrack trucks) to electricians working in the forward areas. Coincidentally, forward area compounds, of which the compounds in Area #3 and Area #9 are illustrative (REECO Exhs. 6, 24, and 33), were constructed in various forward areas, as the AEC testing programs shifted into such areas. These forward area compounds cover many acres of land, are served by roads, contain semipermanent or permanent buildings used as craft shops by electricians, plumbers, carpenters, etc. with contiguous areas, often fenced, where craft materials are stored. In Area #3 compound there are two fenced electrical compounds, one being the general electrical compound and shops (REECO Exh. 6-G) and the other, the fabrication yard (REECO Exh. 6-H), where coaxial cable is spliced and fixtures are attached to the cable ends prior to the transportation of such cable to points of use in the field—mainly within a 3-mile radius of the compound (Tr. 353; Tr. 608). In Area 9, the major part of such cable splicing activities is carried on at the points of use, in portable splicing shacks, and, with some variations, depending upon the readiness of the test hole to receive cable, a large part of the cable used in Area #9 is delivered directly to the points of use by Teamster truck drivers dispatched

either from the Supply Department cable yard at Area 12, or from the Supply Department central warehouses and yards at Mercury, (Tr. 608).

From the standpoint of REECO's administrative organization, the Supply Department maintains permanent warehouses and yards at Mercury (REECO Exh. 42); Area #12 (REECO Exh. 45 and Exh. 46); Well 3 Warehouse Yard (REECO Exh. 43); and Warehouse "C" (REECO Exh. 44; Tr. 908). The first two locations serve REECO's Construction Department; the second two locations serve REECO's Drilling and Tunneling Department. The Supply Department accounts for all materials and supplies under a perpetual inventory system. The permanent warehouses of the Supply Department are staffed by Teamster Warehouse personnel (Warehouse Foremen, Warehouse Clerks (receiving and issuing), Warehousemen and Forklift Operators) working under the AGC Agreement (T Exh. 5). The supply Department also has assigned to it out of the Teamster Motor Pools at Mercury and Area #12, Teamster truckdrivers working under the AGC Agreement. Materials of all crafts to be delivered from Supply Department Warehouses to forward area compounds or points of use are loaded and hauled by Teamster personnel (except for the first load of the shift carried on electrician's work trucks), and this phase of the operation is not a point at issue in this proceeding.

The forward area compounds, like those in Area #3 and Area #9, are under the aegis of REECO's Construction Department. For purposes of REECO's internal accounting, when materials or supplies are needed in the forward areas, they are requisitioned from

the Supply Department by the Construction Department by means of a RMS (Request for Materials and Services (REECO's Exh. 48), pursuant to specific work orders, and are either filled by the Supply Department from inventoried items on hand, or are procured from outside suppliers by stock order or special order, (Tr. 937). In either case, once such requisitioned materials are delivered to a forward area compound, the Supply Department treats them as having been "sold" to the Construction Department (Tr. 936, 937). They are taken off the inventory of the Supply Department and are henceforth deemed expendable. Although requisitioned by work order number, the evidence shows that, in fact, such materials are often stored for from three to twelve months in the forward area compound, awaiting use (Tr. 485); that it is common practice to order 5% to 10% more material than is actually needed as a "cushion", and that often materials ordered by work order number for one wellhole will be used on another (Tr. 487; Tr. 1606). The REECO Exhibits 6, 24 and 33 give some indication as to the volume of materials on hand at a given time in these forward area compounds. REECO Exhibit 51 is indicative of the dollar volume of materials issued and returned to the General Store Division of the Supply Department for the months of June, September and December 1963, and March 1964.

A crew of Teamster truck drivers, under a Teamster foreman, and driving 1# ton to 5-ton flatracks, semi-trailers, water trucks, and other vehicles, is assigned to each forward area compound to support the electricians, plumbers, carpenters, and other crafts working in and out of the compounds (Tr. 1674; Tr. 1591;

Tr. 1512, 1517; See, also REECO's Exh. 55, showing number of Teamster truck drivers assigned to construction and drilling departments in various areas of NTS, and compare REECO Exhs. 53 and 54, showing like distribution of other crafts through forward areas). The vehicles assigned in the forward compounds for the use of crafts other than the electricians are in large measure limited to small pick-ups, carry-alls, and power-wagons. The evidence shows quite conclusively that (except for occasional localized "jurisdictional" skirmishes when a plumber or carpenter may load more in his pick-up than the Teamster thinks he should—all of which disputes are settled in the field at the ship steward level), the Teamsters' in the forward area compounds haul by means of trucks assigned to them all fabricated and unfabricated materials from the craft shops of all crafts, except the electricians, to the points of use where such materials are to be installed, (Tr. 1517, 1518). The evidence also shows that until the Summer or Fall of 1963, Teamsters hauled certain items from the electrical compounds to the points of use, such as, portable splicing shacks, generators, panel boards (REECO'S Exh. 22), transformer trailers (REECO Exh. 19), and returned empty cable reels from the points of use to the electricians' compounds (Tr. 1519), but that within the last nine months, or year, there has been a gradual "phasing out" of the Teamsters from all hauling for the electricians, (Tr. 1527, 1528). During the same period of time, large numbers of vehicles (including flatrack trucks not modified for use as work trucks by the installation of reel-racks, booms, tool and part cribs, and the like) have been assigned by REECO for the use of electricians in the forward compounds, (Tr. 1537).

Teamster stewards and business agents had continuously protested what they considered to be an encroachment by the electricians upon work assigned to the Teamsters by the Carter-Leigon agreement and the 1957 work assignment award, (Tr. 1859). Such protests were usually met by REECO requests that the union furnish specific times, places and occasions, and promises to investigate and correct any mis-assignments if the complaints were found to be warranted, (Tr. 1850). Implicitly, therefore, REECO recognized the Carter-Leigon agreement and the 1957 work assignment award to be in effect in the forward areas, but only asked for proof of violations, (Tr. 1924). Finally, on November 18, 1963, the Teamsters addressed a letter to REECO, itemizing by Truck Number certain flatrack trucks used by electricians in Areas #3 and #9 in violation of the Carter-Leigon agreement, and the 1942 General Presidents'Agreement between the IBT and the IBEW which was incorporated in the Carter-Leigon agreement (T Exh. 10). *Since the letter made reference to Article III-E of the AGC Agreement, freeing the union of its no-strike pledge as to a contractor failing to implement an arbitration award or an International Presidents' award under Article III-D, it is evident that the Teamsters regarded the Carter-Leigon agreement (negotiated at the International level and embodying the agreement of the International Presidents of IBT and IBEW) as "determinations reached by the International Presidents of the Unions involved." It should be noted, also, that the 1948 AGC agreement (REECO Exh. 5) was in effect when the Carter-Leigon agreement was signed and contained in Article III-F substantially the same provisions as are now contained in Article III-D of the current AGC agreement* (T Exh. 5).

The evidence shows that REECO failed to follow up the grievance set forth in Teamsters' Exhibit #10 until prompted to do so by a series of telephone calls from Carter to Lemon, REECO'S Director of Industrial Relations (Tr. 1872-1873). A conference followed, at which REECO, for the first time, took the position at the top management level that the forward area compounds were part of the jobsite, rather than "warehouses, shops or yards" within the meaning of Article 1-B of the AGC Agreement, and that once the materials had reached the electricians' compounds in the forward areas, this constituted the "first drop", and that all hauling beyond that point was the work of the electricians, (Tr. 1869). Further conferences followed, (Tr. 2022). REECO did not reply formally to the Teamster grievances set forth in the letter of November 18, 1963 (T Exh. 10) until April 1, 1964 (T Exh. 12). It is noteworthy that the formal reply followed by one day the submission of this grievance by the Teamsters on March 30, 1964 (T Exh. 11) to the grievance and arbitration machinery of the AGC Agreement. *It is also noteworthy that in REECO'S formal reply, it did not deny the applicability of the Carter-Leigon agreement to hauling electrical material between the forward compounds in Areas #3 and #9 and the points of use (which was the subject of the Teamsters' complaint), but took the position that "the above mentioned Understanding and Agreement is being complied with in the instances cited by your November 18, 1963, letter and the accusation of jurisdictional violation is unfounded."*

The AGC Joint Conference Board, consisting of both employer and union representatives, met early in April to consider the grievance. After the initial hearing, the

Board reconveyed at the test site to make an on-the-job investigation of conditions. It is undisputed that both REECO and Teamsters Local #631 were represented at, and participated in, both the initial hearing and the inspection trip to the test site. There is substantial evidence tending to show that REECO at no time during these proceedings questioned the authority of the AGC Board to hear and determine the grievance, (Tr. 2027).

On April 30, 1964, the AGC Board rendered its unanimous award (T Exh. 13). Immediately after rendition of the award, the Teamsters asked REECO to put the award into effect (Tr. 149). REECO asked for time to study the award. On May 15, 1964, REECO asked the AGC Board to clarify "this adverse award" in certain particulars, and, for the first time—raised the contention that the "award appears to be a determination of a jurisdictional dispute" which should have been resolved by the machinery of Article III-D of the AGC Agreement (T Exh. 14). On May 7, 1964, the AGC Board rendered a clarification of its award (T Exh. 15).

A fair reading of the April 30th award, the May 5th request for clarification, and the May 6th letter of clarification will show, we believe, that the AGC Board held as follows:

1. That, while the Carter-Leigon agreement might be binding upon REECO, Teamsters Local #631, and Electricians Local #357, the AGC Board could give it no recognition for purposes of this proceeding because it had never been incorporated in the AGC Agreement with the requisite formalities.

2. That, apart from the Carter-Leigon Agreement, REECO's practice of having Electricians haul electrical materials from area compounds to points of use in trucks other than work trucks, is in violation of "established trade practice in the area", and, therefore, in violation of Article III-F of the AGC Agreement.

3. That, "insofar as the warehousing function was concerned," the Board made no finding of violation because in the three areas visited, Areas #3, #9, and #17, fabrication was going on in the electrical compounds and, for that reason, they must be regarded as electrical shops, rather than warehouses.

The above review summarizes both the earlier history and recent background of the dispute over the handling and hauling of electrical materials. It is clear from this review that all parties concede the right of Teamster personnel to load electrical material at REECO'S permanent warehouses, and to deliver this material by truck to electrical compounds in the forward areas. It is also clear that the focus of the dispute as to electrical materials was two-fold:

1. *Are the forward area electrical compounds to be considered "warehouses, shops or yards" within the meaning of Article I-B of the AGC Agreement so that warehousing within them, and trucking out of them, is to be performed by Teamster personnel within the classifications of that Agreement, or with a composite crew under the Carter-Leigon Agreement?* This question was resolved against the Teamsters as to the Areas #3, #9, and #17 electrical compounds by the AGC Board award.

2. *Are the Teamsters, under the AGC Agreement, the Carter-Leigon Agreement, and area practice, en-*

titled to haul electrical materials by truck from the forward area electrical compounds to the points of use? This question was resolved in favor of the Teamsters by the AGC Board, not under the Carter-Leigon Agreement, but under area practice. Teamsters were, therefore, awarded the work of delivering electrical materials from compounds to points of use, except where deliveries were effected by work truck. Here again, we submit that a fair reading of the AGC Board award, in the light of the arguments which the Teamsters advanced to the Board and of the electrician activities which the Board found to violate area practice, shows that "work trucks" are to be defined in terms of function as trucks which "were required to stay on the job with the electrical crews and could not be used to shuttle back and forth between the yards and jobsites." (T #13).

As so often happens in labor disputes, however, there were other labor disputes in process between Teamsters Local #631 and REECO, which were more or less contemporaneous with the major dispute over the handling and hauling of electrical materials. *Different demands were made by the union at different times, and different union action was taken to implement different demands.*

1. Dispute Over Receiving Clerk in the Mixed-Materials Compounds.

On January 8, 1964, Teamsters Local #631 addressed a letter to REECO protesting the assignment of warehouse work in the mixed-materials compound in Area #9 compound by operating engineers, laborers and a non-manual (white collar) clerk (REECO Exh. 1). This letter was written by Carter pursuant

to complaints received from his steward and without personal investigation (Tr. 2038). In February or early March, 1964, Carter and Lemon of REECO inspected this compound. Lemon agreed that there were inadequate controls being exercised over the receipt and issuance of materials from this compound (a fenced area within Area #9 compound in which materials used by all the crafts, but the electricians, is stored—See REECO Exhs. 33, 34, 35, and 36)—and promised that a Teamster warehouse clerk would be assigned to this compound, and similar mixed compounds in other areas (Tr. 2041-2042, 2047). Carter, for his part, agreed that there was insufficient work in this compound to create a full-time job for a Teamster forklift operator and that the compound could continue to be served by the Operating Engineer forklift operators working in the area. (Tr. 2041-2042, 2047).

Carter took this arrangement to constitute a definite commitment by REECO that a Teamster receiving clerk would be assigned to the mixed-materials compounds and a definite waiver on the part of the Teamsters Local No. 631 of its prior demand for a Teamster forklift operator in such areas, (Tr. 121, 124). The company failed to make the assignment, although, when Carter communicated with Lemon, Lemon affirmed that he had given orders that a receiving clerk be assigned, and stated that he did not know why they had not been carried out, (Tr. 2050-2051). Ultimately, Lemon admitted he had been overruled by top management.

On or about April 21, 1964, by prior arrangement between Carter and Groeniger, Labor Relations Director for the AEC Nevada Operations Office, Carter

and an AEC investigator toured the test site to study receiving and issuing practices in the various forward area compounds (Tr. 2060-61). Carter made this investigation because his truck drivers were complaining that there was no one in the mixed compounds with authority to tally-in deliveries and sign delivery receipts which would clear the drivers of responsibility for the items delivered—also, because, as a citizen, he thought that the receiving practices in the forward areas were loose to the point of being scandalous. They toured through about 300 miles of test-site and visited many compounds, most of which were completely unattended. In those that were manned, no one paid any attention to the visitors, though they were driving a private station wagon and could have helped themselves to various valuable materials and equipment, (Tr. 2060-2063).

2. Teamster Refusal to Handle Deliveries to Electrical Compounds Unless Staffed by Composite Crews.

We would be less than candid if we did not admit that Carter's inspection trip through the forward areas on April 21, 1964 was intended, at least in part, to bring pressure upon REECO to implement its promise to assign receiving clerks to the mixed-materials compounds, similar to the mixed-materials compound in Area #9.

Quite coincidently, however, this inspection trip also triggered the Teamsters' demand for composite staffing—pursuant to the Carter-Leigon Agreement—of all electrical compounds in forward areas where electrical materials were being stored for future use, and triggered the Teamsters' actions during the period from April 22nd, through April 28th in refusing to load, deliver, or permit offloading of materials at elec-

trical compounds unless compositely staffed by Teamsters and Electricians.

On April 21, 1964, while Carter and the AEC investigator were in Area #17 electrical compound, Carter observed eight Electricians loading a single pick-up truck (Carter, Tr. 2062). He was informed that they had been at it all morning. In the meanwhile, two Teamster-driven flat rack delivery trucks were standing by, waiting to be unloaded, (Tr. 2062). Carter spoke to Taylor, the superintendent in charge, and demanded that there be an equal number of Teamsters to Electricians assigned to load and unload the trucks, in accordance with the Carter-Leigon agreement, (Tr. 2063-2065. Taylor said the area was just starting up and that although it might become a warehouse later, it was still an electrical compound where electricians were to do the loading and unloading, (Tr. 2065). Carter took the position that if it was not a warehouse, all the work belonged to the Teamsters because, under the Carter-Leigon agreement, Electricians had only been given composite-staffing rights in warehouses (Tr. 2065-66). Carter then ordered the two Teamster trucks to return their loads to the Area #12 warehouse and stay there until REECO put a composite crew of Teamsters and Electricians in the electrical compound to do the unloading, (Tr. 2066, 2068-2071).

The following day, Carter met with Lemon and Crockett, the REECO Project Manager, at the office of AEC. At this meeting, Carter informed REECO that the Teamsters were insisting that REECO comply with the Carter-Leigon agreement and the 1957 work assignment award and that until REECO complied, the Teamsters were going to refuse to deliver

any materials to the electrical compounds, (Tr. 2073-2077). REECO placed neither Crockett, Lemon nor Goreniger on the stand to dispute this testimony. Carter thereafter issued instructions to his business agents and stewards to stop only material going to electrical compounds "where the electricians were loading, unloading, and hauling it.", (Tr. 2078-2079). However, he learned later that in some cases the business agents and stewards had violated his instructions and had failed to make deliveries to other crafts where there were mixed loads and the first delivery was routed to an electrical compound, (Tr. 2079-2080). Teamster business agents, however, have "no authority to establish policy" for the union (T Exh. 36).

It will be noted that the above action took place before the rendition of the AGC Board award on April 30, 1964.

It seems self-evident from the above review that the proscribed acts complained of, which occurred from Arpil 22 to April 28, 1964 were intended to implement the Teamster demand for adherence by REECO with the Carter-Leigon agreement *as applied to composite crews in electrical compounds*—construed by the Teamsters to be field warehouses or yards. This is evident from the events which immediately preceded, and triggered, the Teamster refusal to deliver materials to electrical compounds between April 22 and April 28th. (Tr. 2062-2071).

On the other hand, the Teamster action during this period was not intended to implement the previously made Teamster demands for a receiving clerk in the mixed-materials compounds, nor for a Teamster fork-lift operator in such compounds. For the Union then

believed that the REECO officials were going to comply with the former demand, and abandoned the latter demand as economically unfeasible. In any event, since the non-existent job of receiving clerk in the mixed-materials compound was not then claimed by any other union, craft or class, had the union action been intended to implement a demand for assignment of such work, it would not have been a violation of Section 8(b) (4) (D). *Local 107, Teamsters (Safeway Stores),* N.L.R.B. 1961, 49 LRRM 1343; *Electrical Workers I.B.E.W. (Mechanical Contractors Ass'n),* 120 N.L.R.B. 158 (1959) 44 LRRM 1608. The Board evidently so found in its decision of December 16, 1964 in the Section 10(k) phase of this proceeding, for it completely ignored the Teamster demand or a receiving clerk and forklift operator in the mixed-materials compounds.

Nor was the Teamster action during this period from April 22nd to April 28th intended to implement the Teamster demand that REECO comply with the AGC award by assigning to Teamsters, rather than Electricians, the work of hauling materials from electrical compounds to points of use. This is self-evident —for the AGC award was not formally rendered until April 30th, and at that time the Teamster refusals to make deliveries to the electrical compounds had ceased, and normal work had been resumed.

Carter met with the REECO officials to discuss the AGC award on the afternoon of April 28th, (Tr. 310). However, at that time, REECO had not yet seen the award and asked for time to study it, to which Carter agreed (Tr. 2084; Tr. 310). Carter met again with the company officials on May 8th, and, at that

time, demanded to know whether the company was going to comply with the award. The company officials showed Carter the preliminary report of the NECA Committee dated May 7, 1964 (IBEW Exh. 2-B) and said that this was now a jurisdictional dispute because they had two conflicting awards from the same work, and that, therefore, the company was not going to comply with the AGC award (Tr. 2086).

Carter then informed the REECO officials that under Article III-E of the AGC Agreement, (Tr. 2091), the Teamsters were going to refuse to deliver materials to the electrical compounds until REECO complied with the AGC Board award, (Tr. 2089). REECO then took the position that the award did not require the Company to change any work assignments and that the Company was in compliance with the AGC Board award. (Tr. 365, 373-374). Carter then said:

"We will wait until you have or haven't before any action is taken.", (Tr. 2089; See, also, Tr. 2111).

On the same day, the Company prepared its Amended Charge, which is dated May 8th, but was filed with the Regional Director on May 11th. This charge specifies refusal to perform services, inducements not to perform service, and threats, coercion and restraint against REECO "on each of said dates." *The dates specified are April 22nd, to April 28th, inclusive.*

On May 11, 1964 the Union ascertained that REECO was not complying with the AGC award, (Tr. 2110), but was permitting electricians to haul materials from compounds to points of use. The Teamsters then refused to load or haul materials from the Supply Department warehouses to the electrical compounds. That afternoon, REECO took the Teamsters refusing

to handle materials off pay status. This triggered the picketing which commenced May 12, 1964, (Tr. 2110-13).

This, then, represented the third stage of the dispute which developed through three distinct phases:

First, the dispute over receiving clerks and forklift operators in the mixed-materials compounds was settled, by what the Union thought was a company agreement to install receiving clerks, and by union abandonment of the claim for assignment of a forklift operator. These demands were never implemented by a work stoppage or picketing.

Second, the demand for adherence to the Carter-Leigon Agreement through composite-staffing of the electrical compounds in forward areas was implemented, during the period from April 22 to April 28, 1964, by refusals of Teamsters to load and haul electrical and (contrary to Union instructions) other materials, to forward area compounds.

Third, commencing on May 11, 1964, the Teamsters' refusal to load and haul, and, commencing on May 12, 1964, their picket line, was intended to implement the Teamster demand that REECO comply with the AGC award that, in accordance with area practice, Teamsters do the hauling of materials between electrical compounds and worksites—except when materials were transported by electricians' work trucks remaining at the site of work and not shuttling back and forth for additional materials.

The above, in a nutshell, is the essence of the successive Teamster demands, and the economic action taken by Teamster Local #631 to enforce them.

Questions Presented.

1. Whether primary jurisdiction over the disputed issues was vested in the Federal District Court in view of the facts and circumstances of the case.
2. Whether the National Labor Relations Board improperly exercised jurisdiction in its determination that a jurisdictional dispute existed which required the Board to invoke its powers under Section 10(k) of the Act.
3. Whether the Order of the Board is sufficiently clear and specific, and whether such a board blanket order was justified.

ARGUMENT.

The Respondent's argument proceeds, in effect, as follows:

1. The Carter-Leigon Agreement, whereby two unions allocated work between themselves, having long recognized and given effect by their common employer as the Board itself found, in its Section 10(k) decision was a "Contract" entitled to judicial interpretation and enforcement under Section 301 of the Act.

2. When, on May 21, 1964, and before the filing of Complaint herein by the Regional Director, the Respondent herein filed suit in the United States District Court for enforcement of its contractual rights against REECO, in which the IBEW intervened, the District Court was clearly vested with jurisdiction to determine whether or not such a contract existed and its meaning and applicability to the dispute.

3. Determination of such issues by the District Court adversely to claims of Respondent was a condition precedent to the right of the Board to assume jurisdiction, first, to make a Section 10(k) determination, and, second, to determine whether Respondent's acts in implementation of its claim to such work tasks constituted a violation of Section 8(b) (4) (D). For, if the contract issue should be determined by the Court in favor of the contract claims of Respondent, then acts of the Respondent in implementation of its contractual rights (under such tri-partite agreement between Teamsters, Electricians and the Employer); would not be for a proscribed purpose, and Respondent would not then be guilty of such proscribed acts for a proscribed purpose, as alone, would warrant interposition by the Board in a Section 10(k) proceeding.

Consequently, if determination by the District Court of the contract issues pending in Case No. 666 was a condition precedent to the existence of an unfair labor practice which would "trigger" the Board's jurisdiction, to argue, as did the Trial Examiner, that Respondent had no contractual rights which would preclude Board jurisdiction on the basis of what the Board found in a Section 10(k) decision which, if Respondent is correct, it was without authority to make, surely partakes of circular reasoning.

4. The Board's Order is insufficiently clear, unprecise, is too broad such as to be punitive rather than remedial, on excessive exercise of jurisdiction.

Argument I.

A long series of Supreme Court decisions interpreting the National Labor Relations Act, 29 U.S.C. 141, *et seq.,* has made it manifestly clear that labor contracts are not to be regarded as ordinary private contracts, but are vested with a public interest necessitating that they be construed and enforced in a manner designed to effectuate national labor policy. The Supreme Court has, therefore, thrown a high mantle of sanctity about the judicial enforcement of labor contracts, and, particularly, provisions therein calling for resolution of disputes under such contracts through the arbitral process.

In *Textile Workers v. Lincoln Mills* (1957), 353 U.S. 448, 40 LRRM 2113, the Supreme Court held that by enacting Section 301(a) of the Taft-Hartley Act, Congress had, not only created a federal forum and a procedural remedy for suits brought to enforce labor contracts, but that "the substantive law to apply

in suits under Section 301(a) is federal law which the courts must fashion from the policy of our national labor laws."

Subsequently, in its 1960 "arbitration triology" the[1] Supreme Court ruled that arbitration, when agreed to by the parties by the terms of their labor contract, is the very heart of the collective bargaining process.[2] Consequently, when exercising jurisdiction to compel compliance with a provision in a labor contract that all disputes "as to the meaning and application of the provisions of this Agreement" would be submitted to arbitration, the Court held that an "order to arbitrate the particular grievance should not be "denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted disputes. *Doubts should be resolved in favor of coverage.*" 363 U.S. 574, 582-83. (Emphasis supplied). The emphasis upon arbitration was said by the Court to rest in national labor policy: ". . . present federal policy is to promote industrial stabilization through the collective bargaining agreement. . . . A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." 363 U.S. 574, 578.

---

[1]*United Steelworkers of America v. American Manufacturing Company* (1960), 363 U.S. 564, 46 LRRM 2414; *United Steelworkers of America v. Warrior and Gulf Navigation Company* (1960), 363 U.S. 574, 46 LRRM 2416; and *United Steelworkers of America v. Enterprise Wheel and Car Corporation* (1960), 363 U.S. 593, 46 LRRM 2423.

[2]"But the grievance machinery under a collective bargaining agreement is at the very most of the system of industrial self-government. . . . The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement." *Steelworkers v. Warrior Navigation Co., supra.*

The Supreme Court has held, moreover, that the labor contracts cognizable and enforceable under Section 301(a) of the Taft-Hartley Act include more than purely consensual collective bargaining agreements between employer and union. Thus, in *John Wiley & Sons, Inc. v. Livingston* (1964), 376 U.S. 543, 55 LRRM 2769, the Supreme Court made it clear that, in the contest of labor relations, the consensual basis of arbitration must, at least in some circumstances, give way to the requirements of national labor policy, so that a corporate employer will be required to arbitrate with a union under a collective bargaining agreement between the union and another corporation which has merged with the employer, where there has been a "relevant similarity and continuity of operation across the change of ownership," *even though the employer was not a signatory to the agreement calling for arbitration.* And, in *Retail Clerks v. Lion Dry Goods,* 369 U.S. 17, 49 LRRM 2670, a "Statement of Understanding" negotiated through the efforts of a local mediation body in settlement of a strike, which provided that the employer would reinstate strikers without discrimination and which also contained an acknowledgment that the union was not then entitled to recognition as the exclusive representative of the employees, was held a "contract" within the meaning of Section 301(a) of Taft-Hartley and, therefore, enforceable in a suit brought thereunder. The Court declared that, "if this kind of strike settlement were not enforceable under §301(a), responsible and stable labor relations would suffer, and the attainment of the labor policy objectives of minimizing disruption of interstate commerce would be made more difficult." 369 U.S. 17, 27.

In *Lion Dry Goods,* the Supreme Court also recognized that a "no-raiding" agreement between two unions, as well as a collective bargaining agreement between employer and union, was a "contract" cognizable and enforceable under Section 301(a) of the Taft-Hartley Act. Thus, the High Court cited, with approval, the decision of the Court of Appeals for the 7th Circuit in *United Textile Workers v. Textile Workers* (1958), 258 F. 2d 743, 42 LRRM 2605, in the following words:

> "A federal forum was provided for action on other labor contracts besides collective bargaining contracts. See, e.g., *United Textile Workers v. Textile Workers Union* (CA 7, Ill.), 258 F. 2d. 743 (no-raiding agreement)." 369 U.S. 17, 26.

Substantive federal law, therefore, recognizes as binding and enforceable, in a Section 301(a) suit, *an agreeemnt between two labor organizations to forbear from encroaching upon each other's jurisdiction. (United Textile Workers, supra).* In the last-cited case, disregarding a "no-raiding" agreement between the two unions, Defendant union organized employees at a plant who had long been represented by Plaintiff union and petitioned the Board for a representation election. Following a Board hearing on the petition, but before its decision, an arbiter appointed under the "no-raiding" agreement held a hearing and found that by organizing such employees and petitioning the Board to represent them, Defendant union had violated the "no-raiding" agreement. Although this arbitral award was called to the attention of the Board, the Board thereafter issued its decision, specifically rejecting the contentions made under the "no-raiding"

agreement and ordering a representation election. Upon the petition of the Plaintiff, the Federal District Court thereupon issued an injunction requiring Defendant union to withdraw its representation petition from the Board. Affirming this decision, the Court of Appeals, in the decision, later cited with approval by the Supreme Court in *Lion Dry Goods,* said

> "One of the central findings of fact made by the district judge lays bare the core of the practical situation before us: 'Unless defendant is ordered to withdraw its petition, the National Labor Relations Board will, pursuant to its decision issued April 16, 1958, in Case No. 13-RC-5738, conduct a representative election on * * * (Defendant's) petition among the employees of Personal Products Corporation and the *plaintiff will be irreparably injured and its rights under the Agreement will be frustrated and denied.'* There is nothing in this record showing duress or coercion exerted on the defendant Union to induce it to become a party to the Agreement it now anxiously seeks to repudiate.
>
> "We think it quite clear that the defendant union engaged in a course of activity designed to disrupt Plaintiff's established bargaining relationship with Personal Products Corporation at its Chicago plant. David L. Cole, the impartial umpire, found this to be the situation and defendant, apparently, does not seriously controvert the fact. Of course, the Umpire's function is to decide whether the act complained of constitutes a violation of the Agreement, and this the Umpire must do irrespective of whether there are adequate or effective remedies to follow. If we struck down §301, the aim of the 'No-Raiding' agreement would be nullified and it would

be the same old familiar story where men enter into an agreement, one party to which either knows in advance, or later seeks to escape, because there is no enforcing apparatus. Apparently, Congress realized that without coercive measures placed in the hands of parties to agreements, the paper bearing empty words becomes a useless thing. Textile Workers v. Lincoln Mills, 353 U.S. 448, 40 LRRM 2113, 2120 (1957) manifests such an awareness. . . .

"The defendant Union is urging that despite its contractual commitment with plaintiff Union, it is free to raid and capture members belonging to plaintiff, because federal courts are without jurisdiction to compel obedience to Non-Raiding Contracts. We disagree." (Emphasis supplied).

In *Firemen and Oilers v. Machinists* (1964 CA 5th). 338 F. 2d 176, 57 LRRM 2459, the Court of Appeals for the Fifth Circuit affirmed the jurisdiction of the Federal district court, under Section 301(a) of the Taft-Hartley Act, to enforce an arbitral award holding that efforts of one certified union at the plant to obtain work claimed by another certified union constituted a violation of the AFL-CIO No-Raiding Agreement. The reviewing Court held that the arbiter did not exceed the scope of his authority in so holding, and the District Court did not abuse its discretion in enforcing such award in a Section 301(a) proceeding *even though the National Labor Relations Board had concurrent jurisdiction* over the matter and was the superior authority in the premises.

It is but one short step from *John Wiley & Sons, Lion Dry Goods, United Textile Workers* and *Firemen and Oilers,* to the situation presented by the record in

this case. The record clearly shows that an agreement allocating work tasks involved in the warehousing and transportation of electrical materials at the Nevada Test Site was negotiated between international representatives of the Teamsters (IBT) and the Electricians (IBEW), and was executed upon their direction on February 29, 1952 by William F. Carter, Secretary-Treasurer of Teamsters Local #631 and Ralph A. Leigon, Business Manager of Electricians Local #357. (Testimony of Carter, Tr. 1798, *et seq.*; Testimony of Leigon, Tr. 1018, *et seq.*; T's Exhs. 6A and 6B). In its decision upon the Section 10(k) phase of this case, the Board found that:

> "The record shows that from the time of its execution REECO followed the Carter-Leigon agreement in making work assignments and has referred to and relied upon said agreement as a basis for resolving conflict which arose between the Teamsters and IBEW."

In other words, in the Carter-Leigon Agreement we have a consensual agreement between two unions, which is more than a general "no-raiding" agreement, whereby both unions agree in general not to encroach upon the jurisdiction of the other. It is an agreement which actually allocates the specific work tasks which are to be performed by members of each union. It is, moreover, an agreement which has, for all practical purposes, been recognized and adhered to ever since its inception in 1952 by the common employer, REECO. If REECO did not actually affix its signature to the agreement, it is, nevertheless, as fully a party to the agreement as was, the non-consenting employer in *John Wiley & Sons, Inc.* We have then, here, within the

purview of national labor policy and the past decisions of the Supreme Court what must, at least arguably, be regarded as a tri-partite agreement relative to the allocation of work tasks between the two effected unions and their common employer.

If, under the decision in *United Textile Workers, supra,* the contractual rights of a union under a general "no-raiding" agreement with another union were entitled to equitable protection in a Section 301(a) suit, *notwithstanding the undoubted exclusive jurisdiction of the Board over questions of representation, and notwithstanding that the Board had already assumed jurisdiction* over the matter and had held a representation hearing, it would seem that *ipso facto* an agreement between two unions specifically allocating work tasks between their respective members, which agreement has been recognized and followed for many years by the common employer, would be similarly entitled to protection in a Section 301 suit, instituted by one of the Unions *before the Board had even assumed jurisdiction over the dispute.*

It is true that, in the Section 301 suit, as first instituted, the Teamsters were seeking enforcement of an arbitral award which did not, in terms, purport to base the rights of the Teamsters on the Carter-Leigon agreement, but upon area practice. However, the award found an area practice to exist which was parallel to, if not identical with, the allocation of work tasks (involved in hauling electrical materials) made by the Carter-Leigon Agreement, and also found that the Carter-

Leigon agreement may have had "the effect of modifying the relationship and understanding between the company on the one hand and the two unions on the other."[3]

---

[3]See Exhibit B attached to Complaint in Case No. 666, IBEW Exh. 1, and, particularly, Finding of Fact 7, and Conclusions 1 and 3. The Joint Conference Board refused to base its findings and conclusions on the Carter-Leigon Agreement solely because the AGC Agreement was a multi-employer agreement involving other contractors besides REECO and the parties had not complied with the formalities requisite to make the Carter-Leigon Agreement a part of the AGC Agreement. But the Joint Conference Board, nevertheless, stated in Conclusion 3:

> "It is entirely possible that the so-called Carter-Leigon Agreement may have the effect of modifying the relationship and understanding between the Company on the one hand and the two unions on the other but the Joint Conference Board has no power to modify the terms of the Master Agreement itself."

By finding in its Conclusion 2 that REECO's practice in transporting materials from compounds to actual work sites "is not in keeping with established trade practice in the area as contemplated by Article III F of the Master Labor Agreement", the Joint Conference Board must, undoubtedly, have been referring to Findings 5 and 6, preceding this Conclusion, which read as follows:

> "5. Flat Rack trucks were found at each yard or compound visited. Supervisory personnel stated that "such trucks are frequently employed by I.B.E.W. personnel to haul additional materials from the compounds or yards to the various locations as may be required during the course of the work day.
>
> "6. Supervisory personnel stated that Teamsters delivered materials to the compounds or yards and once the material was received by I.B.E.W. personnel Teamsters no longer handled nor transported such material."

When these Findings are considered in juxtaposition to Finding 3, there were I.B.E.W. personnel report at the compound "such electrical personnel may drive power wagons, diggers and work trucks to the location, which work trucks may also carry men and materials," it is clear that the A.G.C. Joint Conference Board regarded "established trade practice in the area" as paralleling the allocation of work tasks made by the Carter-Leigon Agreement. That is, as permitting Electricians to drive power wagons, diggers and work trucks carrying men and materials to the work site on the first trip of the day, but as forbidding Electricians from driving flat rack trucks, regarded as material trucks rather than work trucks "to haul additional materials from the compounds

(This footnote is continued on the next page)

Area practice existing at the time of execution of a collective bargaining agreement is part of the agreement, for it is now well-established that a collective bargaining agreement contains, not only what is therein expressed, but also much that is not therein expressed.[4]

---

or yards to the various locations as may be required during the course of the work day." (See and compare Carter-Leigon Agreement, Teamsters' Exhs. 6-A and 6-B, being part of GC's Exh. 3).

Though the Joint Conference Board, therefore, refused to enforce the Carter-Leigon Agreement, as such, it found an area practice to exist which conformed, in all respects, to the Carter-Leigon Agreement, and, in effect, ordered REECO to cease and desist from departing from such area practice. In its Section 10(k) decision, the National Labor Relations Board refused to give controlling effect to this award, on the ground that the award, itself, was the only evidence in the record of area practice, and that N.T.S. presented a unique situation. However, N.T.S. covers an area of 1500 square miles upon which many general contractors working under the A.G.C. Agreement are employed. It would seem that if N.T.S. is unique, a unique 1500 square mile area may, itself, give rise to an "area practice" and, certainly, the A.G.C. Joint Conference Board, administering the labor agreement under which all general contractors employed at N.T.S. work, would be in a better position than any other tribunal to know, or ascertain, the "trade practice in the area." It is also significant, we think, that, as the Board found in its Section 10(k) decision, no dispute cognizable under section 8(b) (4) (D) existed between the Teamsters and any other craft, although the record is replete with evidence that Teamsters normally hauled the materials of the other crafts from compounds to points of use, again establishing this to have been the "trade practice in the area", at least as to such other crafts.

[4]". . . The collective bargaining agreement . . . is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . .

> "It calls into being a new common law—the common law of a particular industry or of a particular plant. As one observer has put it: '. . . . It is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, to many unforceable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a com-

In asking the Federal Court, in a suit brought under Section 301 of the Act, to enforce the arbitral award, the Teamsters were, therefore, asking not only for enforcement of the express terms of the AGC Agreement to which Teamsters and REECO were parties, but also the area practice impliedly embodied therein, which had been established by the long-standing tri-partite understanding between Teamsters, Electricians, and REECO, as set forth in the Carter-Leigon Agreement.

It is important to note, moreover, that the Court's jurisdiction to enforce the contractual rights of the Teamsters had been invoked by filing Case No. 666 in the United States District Court on May 21st, six days before the NLRB assumed jurisdiction on May 27, 1964, by noticing a Section 10(k) hearing. An order to show cause why the AGC arbitral award should not be placed into immediate effect issued on May 21st, returnable on June 1st. On May 26th, the Regional Director filed in the same Court Case No. 669, a Petition for a Section 10(1) injunction, which was made returnable by the Court at the same time as the Order to Show Cause in Case No. 666. Both matters were, therefore, considered in a single hearing on June 1,

---

munity like an industrial plant to fifteen or even fifty pages . . . the collective bargaining " 'process demands a common law of the shop which implements and furnishes the context of the agreement. . . .' * * * Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators. . . ." *Steelworkers v. Warrior Navigation Co.,* 46 LRRM 4216, 4218, 4219.

". . . collective bargaining contracts by their very nature cannot fairly be limited to their express provisions." *Pacific Northwest Bell Telephone Co. v. Communications Workers* (1962 C.A. 9th), 310 F. 2d 244, 51 LRRM 2405, 2406.

1964, at which the Regional Director was represented by counsel. The Regional Director must, therefore, be presumed to have known, before the commencement of the Section 10(k) hearing on June 4th, of the contract claims which had been asserted by the Teamsters in the Section 301 suit, and that the IBEW had moved for leave to intervene in the suit. Since the AGC Joint Conference Board award was attached as an Exhibit to the Complaint in Case No. 666, the Regional Director also presumably knew that the Teamsters were seeking enforcement of an award which, although in terms predicated upon area practice, rather than on the "Carter-Leigon" Agreement, had, nevertheless, recognized that the "Carter-Leigon" Agreement may have the effect of modifying the relationship and understanding between the Company on the one hand and the two unions on the other.

In view of the Regional Director's presumed knowledge of these facts, the question arises as to whether, under the circumstances, the Regional Director had authority to proceed, or should have proceeded with the Section 10(k) hearing, where the jurisdiction of the Court to enforce the contractual rights of one of the disputing unions had already been invoked under Section 301 of the Act, and where the contract sought to be enforced was, at least arguably, a tri-partite agreement between the two disputing unions and their common employer, preempting the disputed work tasks in favor of one of the unions. (Compare *United Textile Workers, supra,* where Defendant union was ordered by the Court to withdraw its representation petition, filed in derogation of a no-raiding agreement, though the representation petition was first filed and had already gone to hearing and decision before the Board. Compare, also,

National Association of Broadcast Engineers (National Broadcasting Co.) (1953), 105 NLRB 59, 32 LRRM 1268, recognizing that where there has been a contractual preemption of work tasks, a strike to enforce such contract rights is not a violation of 8(b)(4)(D).)

The Congressional policy of encouraging the parties themselves to adjust their own work task disputes, and of removing such adjustments from the sphere of Board action where they have done so, or have, at least, provided "agreed-upon methods for the voluntary adjustment" of such disputes, is set forth in Section 10(k) of the Act, and has been commented upon by the Supreme Court in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 55 LRRM 2042, 2044, in the following language:

> "The Board, as admonished by §10(k), has often given effect to private agreements to settle disputes of this character; and that is in accord with the purpose as stated even by the minority spokesman in Congress—'that full opportunity is given the parties to reach a voluntary accommodation without governmental intervention if they so desire.' "

Respondent, therefore, respectfully urges two basic propositions:

1. That the Carter-Leigon Agreement, recognized and adhered to since 1952 by REECO, was a tri-partite contractual preemption of the disputed work in favor of the Teamsters (*National Broadcasting Co.*),[5] fully

---

[5]In *National Broadcasting Co., supra,* the Board said: "* * * we are of the opinion that in assigning IATSE stagehands to light the shows of September 26 and October 12, NBC acted in derogation of the NABET contract. The Board is persuaded *to fail to hold as controlling herein the contractual preemption of the*

(This footnote is continued on the next page)

as enforceable in a Section 301 suit as the "no-raiding" agreements protected by the arbitrators and the Courts in *United Textile Workers, supra,* and *Firemen and Oilers, supra,* and fully as effectual as the union's contractual disclaimer of the right to represent certain classes of employees during the contract term which the Board refused to upset through the use of its processes (*Briggs Indiana Corporation)*[6] and is, therefore, to be regarded either as a pre-existing agreed-upon ad-

---

work in dispute, would be to encourage disregard for observance of binding obligations under collective bargaining agreements and invite the very jurisdictional disputes Section 8 (b) (4) (D) is intended to prevent. Moreover, contrary to the contents of NBC and IATSE, we do not consider the fact that NABET possesses neither certification nor Board order as precluding a determination that its contract covers the assignment of the work in dispute. This is so because a *literal construction* of Section 8 (b) (4) (D), in the circumstances in this case, *would require that the Board acquiesce in the invasion of an incumbent union's contractual rights by sanctioning the device of reallocating work assignments under color of an agreement with a rival union at a time when the applicable contract is in full force and effect. The incumbent union compelled thereby to strike to protect its contract* would be denied a determination in its favor in a 10(k) proceeding because it lacked a certification or Board order, a result wholly incongruous with the purpose of the Act to promote stability of bargaining relations and minimize industrial disputes * * *" (Emphasis supplied).

[6]In *Briggs Indiana Corp.* (1945), 63 NLRB 1270, 17 LRRM 46, a had, by the terms of a collective bargaining agreement, disclaimed the right to represent certain classes of employers during the life of the contract. The board refused to lend its processes to "confirm a result which the union agreed it would refrain, temporarily, from seeking to achieve." Although a question of representation was there involved, on principle, *Briggs Indiana Corp.* would seem to be indistinguishable. Why should the Board lend its processes to achieving a result in the instant case which IBEW, by the Carter-Leigon Agreement, and REECO, by its adherence to that agreement, had solemnly agreed that they would not seek to achieve.

"The desirability of discouraging raids among unions" has also recently been assigned by the Board as one of its reasons for expanding its contract-bar from two, to three years. *General Cable Corp.* (1962), 139 NLRB 1123, 51 LRRM 1444.

justment of the dispute within the policy of voluntarism expressed by Section 10(k), or, at least, as removing the Teamster economic action taken to enforce such contractual work task preemption from the sphere of an unfair labor practice proscribed by Section 8(b)(4)(D) *(National Broadcasting Co., supra, Operating Engineers, Local No. 12, infra)* and as, therefore, depriving the Board of jurisdiction to make a Section 10-(k) determination as to such work tasks. *(Carey v. Westinghouse Electric Co., infra).*

2. That where the claim of such contractual preemption of work tasks had been first presented to the Court in a Section 301 suit, the Board should have suspended, or dismissed, its Section 10(k) hearing as one not yet ripe for adjudication, to await Court determination of the underlying contract issue, since a Court determination of non-preemption would have been a condition precedent to the Board's jurisdiction to make a Section 10(k) determination. (*Square Deal Co. v. N.L.R.B.*);[7] *Carey v. Westinghouse Electric Co., infra; Sinclair Refining Co. v. N.L.R.B., infra).*

---

[7]In *Square Deal Co.* (1964 CA 9th), 332 F. 2d 360, 56 LRRM 2147, 2151-52, the Court denied enforcement of the Board's order finding the employer to have violated Section 8(a)(1) and (5) of the Act by refusing to negotiate with the union during the contract term over grievances relating to operation of the employer's unilaterally-established incentive plan, or to furnish the union with information relevant to such grievance. The Court held that, in view of the employer's contention that the union had waived the right to grieve over this question by executing a contract in which such incentive plan was not mentioned, "the existence of an unfair labor practice here is *dependent* upon the resolution of a primary dispute involving *only* the interpretation of the contract." Answering the contention that under Section 10(a) of the Act, the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been established by agreement, law, or otherwise," the Court held the Board's plenary power to prevent un-

(This footnote is continued on the next page)

It appears to us, therefore, that, in deference to the primary competence of the Federal Court, under Section 301 of the Act, to determine whether or not a "contract"

---

fair labor practices inapplicable to a situation in which the claimed breach of duty stems not from the Act, but depends "solely upon a construction of the contract, an area in which the parties themselves have agreed that the dispute be arbitrated." Calling attention to the Board's own decision in *Hercules Motor Corp.,* 136 NLRB 1648, 50 LRRM 1021, as cited by the Court in *Sinclair Refining Company v. N.L.R.B., supra,* the Court concluded that "* * * the question whether the Union by contract has waived its right to grieve respecting the group incentive plan should have been submitted to arbitration. . . . In the absence of an arbitrator's decision on this issue the Board had no power to determine that the Company committed unfair labor practices."

By parallel reasoning, it could be said that, *ipso facto,* where an arbitral award holding the disputed work tasks to have been preempted in favor of the Teamsters was being questioned in a Section 301 suit brought to enforce the arbitral award, by both the company and the intervening union which laid claim to such work tasks, in the absence of the Court's decision on this issue the Board had no power to determine that the Teamsters had committed unfair labor practices, and, therefore, no authority to make a Section 10(k) determination.

While in *Square Deal Co.,* the Court held that jurisdiction of the Board was dependent upon the prior resolution of a question of contract construction by arbitration as called for by the labor agreement, in *Sinclair Refniing Co. v. N.L.R.B.* (1962, CA 5th), 50 LRRM 2830, 2835, the Court went even further, holding that where the claim is made that a collective bargaining agreement is being breached, the dispute may be resolved, either through the arbitration machinery of the contract or through the courts, but that "in this aspect of industrial controversy, the Board is not available as a forum to achieve final resolution. This is because Congress, as a matter of deliberate choice, has rejected proposals by which a breach of contract would constitute an unfair labor practice." In reaching this result, the Court of Appeals noted the recent reminder of this fact by the Supreme Court in *Dowd Box Co., Inc. v. Courtney* (1962), 368 U.S. 502, 49 LRRM 2619, in which the Court quoted the following language from the Congressional Conference Report: "Once parties have made a collective bargaining contract, the conference report stated, 'the enforcement of that contract should be left to the usual processes of the law and not the National Labor Relations Board.' " Compare *Raytheon Co. v. N.L.R.B.,* 326 F. 2d 471, 55 LRRM 2101, holding that the Board must defer to the arbitration process "in view of the importance the Supreme Court lays upon the value of arbitration . . . in effecting the national labor policy."

cognizable under Section 301 existed, and to what extent such contract controlled the current work assignment dispute, and in deference to such contract (if judicially found to be existing and applicable) as a preemption of the disputed work tasks, and in obedience to the command of Section 10(k) that the charge be dismissed if the parties had either voluntarily adjusted, or arrived at an agreed-upon method for the voluntary adjustment of such dispute, the Regional Director should not have proceeded with the Section 10(k) hearing, and the Board should not have proceeded to adjudication, but that the charge should have been suspended or dismissed. *National Broadcasting Co., supra; Sinclair Refining v. N.L.R.B., supra; Square Deal Co., supra.*

Or, to express the matter in a different way, if the Court, in the Section 301 suit, should ultimately have found that, as a result of area practice recognized by both unions and their common employer, or, as a result of an actual tri-partite agreement between them, applicable in the context of the latter-day "forward area compounds", the disputed work tasks have been preempted by contract in favor of the Teamsters, then the Teamster action of May 11th in refusing to handle materials, and of May 12th and following, in striking and picketing, would have to be regarded as lawful action to enforce contract rights and not as an unfair labor practice proscribed by Section 8(b) (4) (D) If this be so, Board jurisdiction to conduct a Section 10(k) hearing would never have arisen.[8] *For the*

[8]The Board's jurisdiction to conduct a Section 10(k) hearing is triggered by occurrence of unfair labor practices in violation of Section 8(b) (4) (D). Absent such unfair labor practices, the Board has no authority to conduct a Section 10(k) hearing. *Carey v. Westinghouse Electric Corp.* (1964), 375 U.S. 261, 55 LRRM 2042, 2043, 2044.

Board has long held that work assignments may be preempted by contract between a union and an employer just as effectually as by Board certification or order, and when so preempted, a strike to enforce such preempted contract rights does not constitute an unfair labor practice violative of Section 8(b) (4) (D). National Assn. of Broadcast Engineers (National Broadcasting Co.) (1953), 105 NLRB 59, 32 LRRM 1268 1270.

To like effect is the recent decision of the Court of Appeals for the 9th Circuit in *N.L.R.B. v. International Union of Operating Engineers, Local No. 12* (1963 CA 9th), 323 F. 2d 545, 54 LRRM 2314, in which enforcement of the Board's order adjudging an unfair labor practice was denied after the Court found as a question of contract construction within the primary competence of the Court (and contrary to the findings of the Trial Examiner and the Board), that a later-made local contract between the union and the employer containing a lawful hiring hall provision, superseded, as a matter of law, an earlier national agreement between the parties which did not contain hiring hall provisions, and that, consequently, by threatening to strike in order to compel the discharge of an employee not hired through the hiring hall, "Local 12 was merely persuading the Employer to comply with a binding contractual agreement" and "did not engage in an unfair labor practice within the meaning of the National Labor Relations Act."

It was to decide the very question of whether the disputed work had been preempted by contract within the meaning of *National Broadcasting Co., supra* that Teamsters Local No. 631 filed its Section 301 suit in

the United States District Court. Since the existence,[9] as well as the legal effect, of a contract, or ordinarily matters for the Court, to be determined as a matter of law[10] and since, as the Supreme Court has said, once the parties have made their labor agreement, "the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board * * *," it appears to us that a determination by the Court as to whether the disputed work tasks had been preempted by contract was a condition precedent to the existence, or non-existence, of a Section 8(b) (4) (D) violation, in the absence of which the Board would have had no authority whatever to engage in a Section 10(k) hearing and determination. *Square Deal Co., supra.*

The arguments above presented are consistent with, although not completely controlled by, a recent series of decisions by the Supreme Court and the lower Federal Courts, which have made it manifestly clear that arbitration may not be denied merely because the National Labor Relations Board has concurrent jurisdiction over the same issues.

Thus, addressing itself to unfair labor practices, the Supreme Court said in *Smith v. Evening News Ass'n.*, 371 U.S. 195, 51 LRRM 2646, that:

---

[9]Thus, for example, the existence of a contract to arbitrate particular disputes has been held to be a matter for judicial determination, in the first instance, as a matter of law. *Steelworkers v. American Mfg. Co., supra* and *Concurring Opinion of Mr. Justice* Brennan.

[10]In *N.L.R.B. v. Int. Union of Operating Engineers, Local No. 12, supra,* the Court said: "Since *ordinarily the legal effect of a contract is determined by a court as a matter of law,* this court is not bound to accept the Trial Examiner's findings and conclusions in regard to the effect of the AGC contract upon the National Agreement. . . ." (Emphasis supplied).

"The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining "contract is not displaced by §301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under §301 (to compel arbitration of the same dispute.)"

Following this decision, in *Carey v. General Electric Corp.* (1963 CA 2nd), 315 F. 2d 499, 52 LRRM 2662, the Court of Appeals upheld, with modification, a District Court decision requiring an employer to arbitrate grievances protesting assignment of work to employees represented by a different union, notwithstanding that the other union was not before the arbitration tribunal and that the employer claimed that this was a work-assignment dispute within the exclusive jurisdiction of the Board.

In *Carey v. Westinghouse Electric Corp.* (1962), 375 U.S. 261, 55 LRRM 2042, the Supreme Court set at rest all doubt upon this issue by holding definitively that bi-lateral arbitration of a work-assignment dispute may be compelled by a Court under Section 301 of the Act, notwithstanding that the other union claiming jurisdiction over such work is not before the arbitration tribunal, and notwithstanding that the Board may have concurrent jurisdiction to determine the dispute if it develops into an unfair labor practice. Compare *Firemen and Oilers, supra,* where a Court order enforcing the arbitral award of disputed work tasks to a union on the ground that the other union had violated a no-raiding agreement in securing them was upheld notwithstanding that the Board had concurrent jurisdiction over the dispute.

In *Humphrey v. Moore* (1964), 375 U.S. 335, 55 LRRM 2031, the Supreme Court held squarely that

even though certain acts are, or might arguably be, an unfair labor practice, where the complaint based on such acts alleges that they are a breach of contract, the matter is one within the cognizance of the Courts under Section 301 of the Act. See *I.L.W.U. v. Kuntz* (1964 CA 8th), 334 F. 2d 165, 56 LRRM 2708.

Applying these principles to the case at bar, it is evident that the concurrent jurisdiction of the Board to make a Section 10(k) determination upon the work task disputes between Teamsters and I.B.E.W. (if such concurrent jurisdiction existed), would not preclude the Teamsters from resorting, as they did, to two-party arbitration before the AGC Joint Conference Board, and, having prevailed in such arbitration, from bringing a Section 301 suit to enforce the award (Case No. 666), even though the other union claiming jurisdiction over such work tasks (the I.B.E.W.) was not a party to the arbitration. In the circumstances of the present case, however, where the I.B.E.W. intervened in such Section 301 suit and where contractual preemption of the disputed work was claimed by the Teamsters as a consequence of what was asserted to be a tri-partite contract between Teamsters, I.B.E.W. and their common employer, it is respectfully submitted that the Board did not even have concurrent jurisdiction to make a Section 10(k) determination, absent a prior Court finding of non-preemption. For the same reason, if it should be sought to distinguish *Carey v. Westinghouse Electric Corp., supra,* as a case in which arbitration was ordered because, absent a strike, the Board's jurisdiction to conduct a Section 10(k) hearing had not yet matured, it can be argued with equal force that the Board's jurisdiction to conduct a Section 10(k) hearing here had not yet matured, and could not mature,

until the Court had first resolved the claim of contractual preemption against the contention of the Teamsters. *Square Deal Loan Co., supra; National Broadcasting Corp., supra.*

It is, therefore, respectfully submitted that:

1. The Board was without jurisdiction to render its Section 10(k) determination of the work task dispute; and

2. That the Board was without jurisdiction to find, in this proceeding, that Teamsters Local Union No. 631 has violated Section 8(b)(4)(D) through its refusal to make deliveries to electrical compounds between April 23 and April 28, 1964, in pursuance of its claim to composite staffing of such compounds, or by reason of its economic action on May 11th and its picketing which commenced on May 12th to implement the arbitral award recognizing the Teamsters' right to the work of hauling electrical materials from compounds to points of use and to implement the Teamsters' claim to contractual preemption of such work.

Argument II.

In the Absence of a Charge of Section 8(b) (4) (D) Violation Filed After Occurrence of Proscribed Acts, the Board Is Without Power to Initiate or Decide a Section 10(k) Proceeding, or to Adjudge Respondent Guilty of a Section 8(b) (4) (D) Violation.

In its Section 10(k) decision, the Board identified and determined two jurisdictional disputes:

1. The dispute over composite staffing of electrical compounds.

2. The dispute over the hauling of electrical materials from compounds to points of use.

The record discloses, and the Board found, that between April 22 and April 28, 1964, Teamster drivers refused to make deliveries to electrical compounds. It is clear from the record, however, that such action was intended to implement solely the Teamster demand for composite staffing of electrical compounds, and that the Teamsters' subsequent actions on May 11th in refusing to make deliveries, and during the period from May 12th to June 1, 1964, in striking and picketing, were intended to implement the AGC Joint Conference Board Award of April 30, 1964 (Exhibit B annexed to Complaint in Case No. 666, IBEW Exh. 1) which had, in effect, put its stamp of approval upon the Teamsters' claim of contractual preemption of the work of hauling electrical materials from compounds to points of use.

An examination of REECO's Original Charge, dated April 28, but filed May 5, 1964 (Tr. 317-318) will show that it pertains only to the economic action taken by the Teamsters during the earlier period, April 22 to April 28, 1964—with reference to the composite staffing dispute. Similarly, the Amended Charge, dated May 8, but filed May 11, 1964 shows upon its face that it complains solely of economic action taken during the April 22 to April 28, 1964 period. It is obvious, therefore, that both the Original Charge and the Amended Charge refer solely to acts in implementation of the composite staffing, and not the hauling, dispute, since the Teamsters' claim to the hauling work was pending before the AGC Joint Conference Board during the period of the earlier economic action, and had not been resolved in favor of the Teamsters until April 30, 1964.

Respondent respectfully urges that since the Board's jurisdiction to make a Section 10(k) determination must

be "triggered" by a strike or threat of strike in violation of Section 8(b)(4)(D), *Carey v. Westinghouse Electrical Corp., supra,* 55 LRRM 2042, 2043[11] and since a Section 10(k) proceeding must be initiated by a charge focusing upon unfair labor practices which have already occurred,[12] Board jurisdiction in this case fails

---

[11]That the Board's authority to make a Section 10(k) determination is "triggered" only by a strike, or threat or strike, is made manifestly clear from the words of the Supreme Court in *Carey:*

> "We have here a so-called 'jurisdictional' dispute involving two unions and the employer. But the term 'jurisdictional' is not a word of a single meaning. In the setting of the present case this 'jurisdictional' dispute could be one of two different, though related, species: either—(1) a controversy as to whether certain work should be performed by workers in one bargaining unit or those in another; or (2) a controversy as to which union should represent the employees doing a particular work. If this controversy is considered to be the former, the National Labor Relations Act (61 Stat. 136, 73 State. 519, 29 U.S.C. §151, et seq.) does not purport to cover all phases and stages of it. While *§8(b) (4) (D) makes it an unfair labor practice for a union to strike to get an employer to assign work to a particular group of employees rather than to another, the Act does not deal with the controversy "anterior to a strike. The Act and its remedies for 'jurisdictional' controversies of that nature come into play only by a strike or a threat of a strike. Such conduct gives the Board authority under §10(k) to resolve the dispute."* (Emphasis added.)

[12]Section 10(k) of the Act provides, moreover, that "*whenever it is charged* that any person *has engaged* in an unfair labor practice within the meaning of paragraph (4) (D) of Section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen. . . . (Emphasis supplied).

It will be observed, therefore, that the Board does not act on its own motion in initiating a Section 10(k) proceeding, but acts only when it is *charged* that some person *has engaged* in the unfair labor practice of striking, or threatening a strike, in order to force or require an assignment of work.

Both the word, "charged" and the use of the past tense, "has engaged", are significant. The signification would appear to be that in order to trigger the Board's jurisdiction to hold a Section 10(k) hearing, proscribed acts directed to a proscribed object

—at least, so far as the determination of the hauling dispute is concerned—because no charge (either original or amended) was ever filed by REECO after occurrence of the economic action of May 11th and May 12th which was oriented towards implementation of the claim to the work of hauling electrical materials from compounds to points of use.

A construction similar to that which we place upon Section 10(k) was placed by the Court of Appeals for the 5th Circuit in *N.L.R.B. v. Fant Milling Co.* (1958), 258 F. 2d 851, 42 LRRM 2566, upon Section 10(b) of the Act. A certified union entered into negotiations with the employer, which continued without progress until May, 1954, when the union filed a charge with the Regional Director that the employer had violated Section 8(a) (5) of the Act by refusing to bargain. The Regional Director refused to issue the Complaint, but the charge remained pending. In October, 1964, while negotiations were still going on, the employer unilaterally put into effect a general wage increase without prior notice to the union, and, a few weeks later advised the union that it was withdrawing recognition and would refuse further bargaining. No new charge, or amended charged, was filed by the Union. However, the Regional Director, acting upon the original charge, pro-

---

must have occurred *before the filing of charge* and the charge must relate to acts which have already occurred.

It is significant, also, we think that Section 10(b) of the Act, which has to do with the initiation of unfair labor practices, generally says that, "whenever it is charged that any person has engaged in *or is engaging* in any such unfair labor practice," the Board is empowered to issue a complaint, while in Section 10(k), dealing specifically with violations of Section 8(b) (4) (D), the italicized language which pertains to continuing violation *in praesenti* is omitted, and only the words, *"has engaged"*, oriented to past violation of Section 8(b) (4) D), are used.

ceeded to file a Complaint which alleged refusal to bargain continuously since November 1953 and also alleged the institution of the unilateral wage increase in October, 1954, some five months after the filing of the charge. The Board, agreeing with its trial examiner, found that the employer's unilateral wage increase, although occurring several months subsequent to the original charge and not the subject of an amended charge, was properly included in the complaint, and found the employer guilty of the unfair labor practice of refusal to bargain, largely because of such unilateral wage increase.

Denying enforcement, the Court of Appeals held that Section 10(b) of the Act requires "that a charge must set up *facts* showing "an unfair labor practice * * * and the *facts must be predicated on actions* which have already been taken . . . the complaint must faithfully reflect the facts constituting the unfair labor practices as presented in the charge . . . it was not proper for the Board to proceed on the basis of the charge of May 20, 1964 and enter the order here before us bottomed upon actions taken more than four months later. . . . If the Board could thus adjudicate the rights of the parties on such subsequent actions which as far as the record reveals, developed from the later stages of the negotiations, using the period covered by the charge merely as background, the statutory scheme would be frustrated and the charge, which alone conferred jurisdiction, would serve only as the trigger to set the mechanism in motion, leaving the Board and its agent *carte blanche* to expand the charge as they might please, or to ignore it altogether." (Emphasis by the Court.)

We are not unmindful of the fact that the decision of the Court of Appeals in the *Fant* case, *supra,* was reversed by the Supreme Court in *N.L.R.B. v. Fant Milling Co.* (1960), 360 U.S. 301, 44 LRRM 2236. However, we think that the grounds upon which the Supreme Court reversed make the *Fant* case distinguishable. Thus, citing its earlier decision in *National Licorice Co. v. Labor Board,* 309 U.S. 350, 6 LRRM 674, the Supreme Court noted that "where the violations set forth in the Complaint are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects," the Board may treat the entire sequence as one. The Court then observed that: "In the present case, as in National Licorice, the unilateral wage increase was 'of the same class of violations as those set up in the charge. * * *' The wage increase was 'related to' the conduct alleged in the charge and developed as one aspect of that conduct 'while the proceeding (was) pending before the Board.'" The Court then proceeded to limit the holding in the *Fant* case in the following significant language:

> "What has been said is not to imply that the Board is, in the words of the Court of Appeals, to be left '*carte blanche* to expand the charge as they might please, or to ignore it altogether.' 258 F. 2d., at 856, 42 LRRM 2566. Here we hold only that the Board is not precluded from 'dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the board.'"

It will be observed, therefore, from this limiting language, that the Supreme Court did not disagree with the Court of Appeals in principle, but only in application. In other words, had the Supreme Court not been of the view that the unilateral wage increase instituted by the employer while the charge of "refusal to bargain" was pending before the Board was "related to", and of the "same class" as, a "continuation of", and in "pursuance of the same objects" as the earlier manifestations of its "refusal to bargain," the Supreme Court may well have upheld the view of the Court of Appeals *that unrelated conduct occurring after the filing of the charge may not properly be made a subject of the Board's complaint.*

Applying these thoughts to the case at bar, we respectfully submit that economic action taken by the Union to enforce an arbitral award holding that the Union has a contractually preempted right to the work of hauling electrical materials from compounds to points of use, is not "related to", of the "same class" as, a "continuation of", and in "pursuance of the same objects" as economic action taken to implement an earlier demand that electrical compounds be staffed by composite crew of Teamsters and Electricians. The charge of "refusal to bargain", which was involved in the *Fant* case, *supra,* is one often resting on circumstantial evidence and to be gleaned by the whole course of conduct of the employer over a period of time, which course of conduct may properly include consideration of post-charge acts which are so related to the earlier conduct that they may properly be deemed part of the whole sequence of circumstantial evidence. These considerations are hardly relevant to 8(b) (4) (D) charges

against a union, which are usually susceptible of proof by direct, rather than circumstantial, evidence, and which may well involve divergent claims to completely unrelated work tasks, the right to which rests upon unrelated circumstances of area practice, skills, efficiency, history and tradition.

Finally, as we have already noted, while a violation of Section 8(b) (4) (D) is an unfair labor practice, it is only unfair labor practice singled out for special procedural treatment in Section 10(k) of the Act, the procedure relating to other unfair labor practices being set forth in Section 10(b) of the Act. And significantly, while Section 10(b) speaks of a charge "that any person has engaged in *or is engaging* in any such unfair labor practice," the italicized language does not appear in Section 10(k) which is framed in terms of reference to acts which have already taken place in the past, *i.e.,* "whenever it is charged that any person *has engaged* in an unfair labor practice" within the meaning of Section 8(b) (4) (D).

We respectfully submit that this difference in language and treatment is not accidental, but arises in direct consequence of the fact that under the Congressional scheme, the Board was given jurisdiction to make work task determinations only when the proscribed acts for the proscribed objects had already occurred. At the risk of undue repetition, we quote again from the words of the Supreme Court in *Carey v. Westinghouse Electric Co., supra:*

> "While §8(b) (4) (D) makes it an unfair labor practice for a union to strike to get an employer to assign work to a particular group of employees rather than to another, *the Act does not deal with*

the controversy anterior to a strike nor provide any machinery for resolving such a dispute absent a strike. The Act and its remedies for 'jurisdictional' controversies of that nature come into play only by a strike or a threat of a strike. Such conduct gives the Board authority under § 10(k) to resolve the dispute." (Emphasis supplied).

We respectfully submit, therefore, that since the jurisdiction of the Board to make a Section 10(k) determination in a work task dispute is triggered only by a strike or threat of strike for the prohibited object, in the case of Section 8(b) (4) (D) violations, unlike other unfair labor practices, the charge must relate to unfair labor practices *which have already occurred,* and the Board is without jurisdiction to base its Complaint on acts occurring subsequent to the filing of the charge. Just as the occurrence of acts constituting a violation of Section 8(b) (4) (D) is the "trigger", so is the charge predicated on such acts, the limit, of the Board's jurisdiction to conduct a Section 10(k) hearing.

What the Court of Appeals said in *N.L.R.B. v. Fant Milling Co., supra,* and what the Supreme Court did not reject in principle, is, therefore, true and particularly applicable here (42 LRRM 2568-2569):

> "Since the authority of the Board derives solely from the statute, it is clear that effective action can be taken only when the machinery set up by the statute is substantially followed. It is further clear that a charge must set up *facts* showing an unfair labor practice as defined in 29 USCA §158,

and the *facts must be predicated on actions which have already been taken.* When the Board is satisfied that the facts contained in the charge have been substantiated, it or its agents then have power to issue and serve upon the person charged with the improper action 'a complaint stating the charges in that respect.' This language can have no meaning except that the complaint must faithfully reflect the facts constituting the unfair labor practices as presented in the charge." (Emphasis by the Court).

Since neither the original charge (dated April 28, 1964), nor the amended charge (dated May 8, 1964) charged the Teamsters with proscribed acts for the purpose of implementing their demand for assignment to them of the work of hauling electrical materials from compounds to points of use, the Board was without authority to make a Section 10(k) determination on this issue, and we respectfully submit that so much of its Decision and Determination of Dispute of December 16, 1964 as purports to do so is void and of no effect. For the same reasons, we respectfully urge that the Board is without jurisdiction in the present proceeding to determine that the Teamsters violated Section 8(b)(4)(D) as a result of their actions from May 11, 1964 to June 1, 1964, taken in implementation of the same demand.

Argument III.

The Board's Order is excessively broad and raises serious questions as to its meaning and application.

The petitioner alleges that the words "or any other person" in the Board's Order "simply means that Teamsters cannot use coercive and unlawful means to force or require any successor employer to REECO at N.T.S. to assign the work in dispute to Teamsters." The Board's Order is not so specific as is alleged.

The Order is not specific with reference to person, time or place.

There is nothing in the record to support such conclusion that would justify such a broad Order.

The Board's Order is broader than the dispute than remedial. The Board is without jurisdiction to punitive jurisdiction. *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 83 L. Ed. 126, 59 S. Ct. 206.

Conclusion.

The Respondent prays that this Court refuse to issue a decree enforcing in whole, or in part, the Order of the National Labor Relations Board, the subject of the Petition for Enforcement proceedings herein.

Dated March 10, 1968.

ROBERT L. REID,

Attorney for Respondent, Teamsters Chauffeurs, Warehousemen & Helpers Local Union No. 631, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT L. REID

No. 21,523

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Respondent,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 357, AFL-CIO,
Intervenor.

On Petition for Enforcement of an Order of the National Labor Relations Board

REPLY BRIEF FOR INTERVENOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS UNION, LOCAL 357, AFL-CIO

CARROLL, DAVIS, BURDICK & MCDONOUGH,
PHILIP PAUL BOWE,
THORNTON C. BUNCH, JR.,
420 J. Harold Dollar Building, 351 California Street,
San Francisco, California 94104,
Attorneys for Intervenor.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Statutes

No. 21,523

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*	
vs.	
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, *Respondent,*	
and	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 357, AFL-CIO, *Intervenor.*	

On Petition for Enforcement of an Order of the National Labor Relations Board

REPLY BRIEF FOR INTERVENOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS UNION, LOCAL 357, AFL-CIO

OPENING STATEMENT

Respondent does not challenge the merits of the National Labor Relations Board Cease and Desist

Order issued against it. Rather, the Respondent argues only that because it considers that certain procedural defenses exist this Court is justified in refusing to issue a decree enforcing the Order of the Board.

INTERVENOR'S REPLY TO ARGUMENT I

In its first of three arguments to this Court, the Respondent advances two propositions:

> 1. The Carter-Leigon Agreement, recognized and adhered to since 1952 by REECO, was a tripartite contractual preemption of the disputed work in favor of the Teamsters, enforceable in a Section 301 cause of action and, under precedent of the Board and Courts to be regarded either as a preexisting agreed-upon adjustment of the dispute within the policy of volunteerism expressed by Section 10(k), or, at least as removing the Teamster economic action taken to enforce such contract work tasks preemption from the sphere of an unfair labor practice proscribed by Section 8(b)(4)(D), and therefore depriving the Board of jurisdiction to make a Section 10(k) determination as to such work tasks.
>
> 2. That when the claim of such contractual preemption of work tasks had been first presented to the Court in a Section 301 suit, the Board should have suspended or dismissed, the Section 10(k) hearing as one not yet ripe for adjudication, to await court determination of the underlying contract issue, since a court determination of non-preemption would have been a condition precedent to the Board's jurisdiction to make a Section 10(k) determination.

The Respondent's first argument has no validity.

The argument is premised on the assumption that the Carter-Leigon Agreement settles any doubt as to assignment of the disputed work in favor of the Respondents, a fact which the Board, fully supported by the entire record herein, found not to be true.

In pertinent part, the Board in its decision in the Section 10(k) proceeding, stated as follows:

> We find, therefore, that the Carter-Leigon agreement does *not* support the Teamsters' claim to composite staffing at the compounds; and, as the Teamsters have no other basis for such claim, we conclude that there is no merit in their contention that they are entitled to any of the work being performed by the electricians at the electrical compounds.

And, the Board further declared:

> In light of these facts we believe the compounds are, in essence, an integral part of the jobsite, and, therefore, under the provisions of the Carter-Leigon Agreement, jurisdiction over the transportation of electrical supplies utilized by the electricians in the performance of their work is vested in the electricians rather than the Teamsters.

Since the Carter-Leigon Agreement did not assign the Respondent composite staffing privileges at the compounds and since the Carter-Leigon Agreement actually gave the work of transporting supplies from the electrical compounds to the point of use to the IBEW, the Respondent's claim that the Carter-Leigon

Agreement is to be regarded as a preexisting agreed upon adjustment of the dispute within the policy of voluntary settlement of disputes expressed by Section 10(k) is, of course, fully self-defeating.

Respondent's alternative claim that the Carter-Leigon Agreement assigns the disputed work to the Respondent there is no unfair labor practice when economic action is taken to enforce the assignment of such work tasks to the Respondent is similarly without validity because, as already demonstrated, the Carter-Leigon Agreement does not make the assignments which the Respondent professes that it does.

Respondent's second proposition quoted *supra* is also without merit. In making its Section 10(k) determination, the National Labor Relations Board clearly did not invade the province of the U. S. District Court for the District of Nevada. Section 10(a) of the Act vests the Board with plenary power to consider all matters necessary to the determination of whether an unfair labor practice is involved, and while the Board as a matter of policy may withhold its consideration of whether an unfair labor practice has been committed until a relevant arbitration award is forthcoming, no case has yet ruled that the Board must stay all its proceedings until the arbitration order is enforced through the courts.

There is good reason for the non-existence of any precedent to the contrary. While it is often in the interests of justice for the Board to withhold its consideration of the merits of an unfair labor practice charge in cases where there is a possibility that arbi-

tration may resolve any question as to the basis for the charge, nothing would be gained and much would be lost in terms of court time, expense and increased delay before a definite ruling on the merits of the case would be handed down if the Board were to automatically withhold its determination of jurisdictional disputes which the Board's enacting legislation specifies must be decided by the NLRB as priority cases. *NLRB v. Radio & Television Broadcasting Engineers Union,* 364 U.S. 573. The Board, of course, has the primary power to render a decision in this "jurisdictional disputes" area of labor law, and it is manifest that the Board can, within its discretion, reject, or decline to wait for, any arbitration award. *Local 1505, I.B.E.W. v. Local 1836, I.A.M.,* 304 F.2d 365, 367 (C.A. 1, 1962); *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261; *Spielberg Manufacturing Co.,* 112 NLRB 1080.

The futility of relying upon bilateral arbitration awards in a trilateral situation is readily apparent. In jurisdictional dispute cases, both unions customarily obtain a favorable award under *their* collective bargaining agreement. Each union then attempts to have *its* award enforced by court action resulting in two conflicting awards and no measureable progress towards resolution of the underlying jurisdictional dispute. The NLRB has been consistent in refusing to give any weight to such bilateral awards in trilateral situations. *Winslow Bros. & Smith Co.,* 90 NLRB 1379 (1950); *NABET,* 105 NLRB 355 (1953); *I.B.E.W.,* Local 4, 129 NLRB 958; *Newspaper and*

Mail Deliverers Union of New York (News Syndicate Co.), 141 NLRB 578.

Respondent's insistence at this level that the NLRB decision is defective because of the existence of respondent's petition in the Federal District Court to enforce its arbitration award is particularly unpersuasive in view of the fact that the District Court itself has refused to proceed and has issued an Order Staying Proceedings in view of the pendency of the NLRB action. (March 9, 1965, *Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 631 v. Reynolds Electrical & Engineering Co., Inc.,* Civil Action File 666.)

INTERVENOR'S REPLY TO RESPONDENT'S ARGUMENT II

Both the intervening Employer and the intervening International Brotherhood of Electrical Workers expended considerable space in their respective opening briefs to this court rebutting Respondent's argument that because neither the original charge nor the amended charge alleged that the Teamsters had engaged in proscribed acts for the purpose of implementing their demand for the assignment of work involving the hauling of electrical materials from the compounds to the point of use the Board was without authority to make a Section 10(k) determination of the issue and also without jurisdiction to determine that the Teamsters violated Section 8(b)(4)(D) as a result of their actions from May 11, 1964, to June 1, 1964, taken to implement the same demand. Because of

the comprehensive discussion already devoted to the argument in the above mentioned briefs and in view of Respondent's failure to raise any significant points not raised in its previous oral and written arguments, it appears sufficient at this time to simply quote from the Trial Examiner's decision of December 27, 1965, dealing with the same argument, which on April 12, 1966, the Board adopted *in toto.*

> The Respondent's second procedural contention is that in the absence of a charge of a Section 8(b)(4)(D) violation filed after the occurrence of proscribed acts, the Board is without power to initiate or render a decision in a Section 10(k) proceeding, or to adjudge the Respondent guilty of a Section 8(b)(4)(D) violation. In support of this contention, the Respondent asserts that the original charge filed herein on May 5, 1964, and the amended charge filed on May 11, 1964, pertain solely to economic action taken by the Respondent during the period April 22 through April 28, supporting its claim in the composite staffing dispute. The Respondent further asserts that the record of the Section 10(k) proceeding, and the Decision of the Board therein, was to the effect that between April 22 and April 28 the Respondent refused to make deliveries to the electrical compounds, actions taken solely in implementation of the Respondent's composite staffing claim and not to enforce its claim to the point of use delivery work. Respondent further contends that since the Board's jurisdiction to make a Section 10(k) Determination must be "triggered" by a strike or threat of strike in violation of Section 8(b)(4)(D) (Citing *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261), and since a

Section 10(k) proceeding must be initiated by a charge focusing upon unfair labor practices which have *already occurred,* the Board's jurisdiction must fail—at least so far as the determination of the delivery dispute is concerned. This is so, contends Respondent, because no charge was ever filed by REECO after occurrence of economic action of May 11 and May 12 which was oriented toward implementation of the claim to the work of hauling electrical materials from compounds to points of use.

The Respondent is quite correct in its assertion that the Board does not act on its motion in initiating a Section 10(k) proceeding, but acts only when it is charged that some person has, prior to the filing of the charge, engaged in an unfair labor practice of striking, or threatening a strike, in order to force or require an assignment of work.

But the Act's requirement of a charge to serve as a predicate for the Section 10(k) proceeding must be construed in conjunction with the well engrained principle that a charge in an unfair labor practice proceeding merely sets in motion the investigatory machinery of the Board—a principle subsumed within the holding of the Supreme Court in *Fant Milling*[19] to which case the Respondent itself alludes.[20]

It seems apparent that investigatory machinery of the Board was set in motion by the charge herein which alleged proscribed conduct to en-

---

[19]*N.L.R.B. v. Fant Milling Co.,* 360 U.S. 301.

[20]See *Texas Industries,* 139 NLRB 365. *Lodge 68 of International Association of Machinists,* 81 NLRB 1108, 1113 at note 3.

force Respondent's claim to the disputed hauling and unloading work. The conclusion patently to be drawn from the Section 10(k) notice issued by the Regional Director, is that the investigation conducted under his auspices had revealed the existence of a dispute encompassing not only the hauling work but the composite staffing issue, as well. The amended charge patently, by its terms, related in part the issue of transporting materials from the compound point of unloading to point of use. It was upon these charges and the investigation undertaken by him that the Regional Director noticed the Section 10(k) matter for hearing, and that the allegations of the complaint in the Section 8(b)(4)(D) proceeding were based.

Even granting contrary to findings hereinafter made, that Respondent's economic action during the April 22 through April 28 period was solely in support of its composite staffing claim, it would be a distortion of the intendment of *Fant Milling* to hold that the delivery dispute was of a different class from, or unrelated to, the composite staffing dispute; and the Respondent inferentially concedes, as it must, that the Board had jurisdiction to hear and decide the composite staffing aspect of the Section 10(k) proceeding, which issue Respondent admits was properly before the Board in the Section 10(k) proceeding. It follows that a decision on the merits on that issue is not for the procedural reasons advanced precluded in this proceeding. And it is from this basic jurisdiction vested in the Board both in the Section 10(k) hearing and the unfair labor practice proceeding that the Board derives its jurisdiction to hear and decide the delivery issue

arising, as I have found, out of a jurisdictional dispute between Respondent and IBEW, dichotomous in nature, broader in its totality, than either the delivery issue or the composite staffing issue alone.

Accordingly, on the foregoing premise, I reject Respondent's second procedural defense. I hold that the charge and amended charge herein alleging conduct violative of Section 8(b)(4)(D) served to set in motion investigatory machinery of the Board, that when the investigation revealed conduct proscribed by Section 8(b)(4)(D) occurring prior to the filing of the original and amended charges, and arising out of a course of action related to the conduct alleged as unlawful in the original and amended charges, the requirements of Section 10(k) that an antecedent unfair labor practice give rise to the issuance of a Section 10(k) notice were satisfied. I further find that, accordingly, the Regional Director acted within his authority and power in including the delivery issue as an issue in the Section 10(k) hearing, the Board had jurisdiction to hear and decide the issues in the Section 10(k) hearing, and to render a decision in the result and unfair labor practice proceeding.

INTERVENOR'S REPLY TO ARGUMENT III

As its last argument, Respondent states that "the order is not specific with reference to person, time or place." Respondent does not state any possible grounds for confusion as to how long the order is to apply. Clearly there can be no doubt as to the duration of its implementation. In the case of the cease and desist order, the Respondent is to comply until, if ever, new contractual terms change the status quo; in the case of the designated affirmative action, the Respondent is to post the notice for the specified period of 60 consecutive days.

So far as application of the Order in regard to person or place is concerned, the spirit and letter of the Order is no less uncertain. Simply stated, the Respondent cannot, with anyone or at any place, engage in the proscribed conduct.

The broad Board Order is obviously warranted in the instant case. Respondent demonstrated an intent and proclivity to violate the secondary boycott provisions of the Act by engaging in an extensive and expanding pattern of conduct violative of the Act's secondary boycott provisions and by attempting to force a reassignment of work to Teamsters not only from electricians but also from other crafts as well. The Board has previously found it necessary to utilize a similarly broad order against Respondent in *Teamsters Local Union No. 631 (Reynolds Electrical and Engineering Co., Inc.),* 154 NLRB 67, at page 70.

The courts have many times upheld similar broad orders of the Board in appropriate cases. *NLRB v.*

Teamsters, Local 522 (CA-3; 1961), 43 L.C. ¶17,199, 294 F. 2d 811; *NLRB v. Teamsters, Local 135* (CA-7; 1959), 37 L.C. ¶65,539, 267 F. 2d 870; *Operating Engineers, Local 825,* 1962 CCH NLRB ¶11,552, 138 NLRB 279, enf'd (CA-3; 1963); 48 L.C. ¶18,503, 322 F.2d 478. *Teamsters, Local 728 v. NLRB* (CA-5; 1964), 49 L.C. ¶19,036, 332 F. 2d 693, cert. den. (1964) 50 L.C. ¶19,327, 379 U.S. 913, 85 S. Ct. 261.

Dated, San Francisco, California,
May 27, 1968.

Respectfully submitted,
CARROLL, DAVIS, BURDICK & MCDONOUGH,
PHILIP PAUL BOWE,
THORNTON C. BUNCH, JR.,
Attorneys for Intervenor.

No. 21,523

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Respondent.

Reply Brief for Intervenor and Charging Party, Reynolds Electrical & Engineering Co., Inc.

WILLIAM F. SPALDING,
STEPHEN E. TALLENT,
JACK H. HALGREN,
GIBSON, DUNN & CRUTCHER,
634 South Spring Street,
Los Angeles, Calif. 90014,

Attorneys for Reynolds Electrical & Engineering Co., Inc., Charging Party and Intervenor.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 21,523

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 631, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Respondent.

Reply Brief for Intervenor and Charging Party, Reynolds Electrical & Engineering Co., Inc.

The basic issues in this case are: (i) whether the National Labor Relations Board had jurisdiction under Section 10(k) of the National Labor Relations Act to hear and determine the jurisdictional dispute and to find that the Respondent had violated Section 8(b)(4)(D) of the Act; (ii) whether the Board is precluded from prosecuting unfair labor practices occurring after the filing of the Charge; and (iii) whether the Board's issuance of a "Broad Form" Cease and Desist Order was justified.

REECO believes that its Opening Brief adequately set forth the considerations which should persuade the Court to enforce the Order issued by the Board. Never-

theless, the failure of Respondent in its Opening Brief to make any effort to distinguish between substantively distinct arguments or to separate fact from hypothesis in connection with the Section 10(k) issue necessitates some further response by REECO on this question.

The Board's Jurisdiction.

In asserting that the Board was without jurisdiction to enter the Order for which enforcement is sought in this Court, Respondent raises what may be considered essentially four arguments:

1. That the Carter-Leigon Agreement rendered the Board without jurisdiction to proceed under Section 10(k) of the Act;
2. That the filing of the Nevada Federal District Court action to enforce an arbitration award rendered pursuant to the Collective Bargaining Agreement between Respondent and REECO deprived the Board of any jurisdiction to proceed under Section 10(k) of the Act;
3. That the parties "adjusted" or "agreed upon methods for the voluntary adjustment" of the jurisdictional dispute pursuant to the provisions of Section 10(k) thus rendering the Board without jurisdiction to proceed under this Section; and
4. That the Section 10(k) proceeding was not ripe for Board consideration since no jurisdictional dispute could exist under Section 8(b)(4)(D) until and unless the Nevada Federal District Court concluded that Respondent did not have a contractual right to the work claimed.

A. The Carter-Leigon Agreement.

Respondent expended almost all of the space devoted to its Statement of the Case and a good portion of its jurisdictional argument in an attempt to highlight the Carter-Leigon Agreement and to stress the Agreement's importance in the present enforcement proceeding. For all of its effort, Respondent has failed to demonstrate the relevance of the Carter-Leigon Agreement either factually or legally to the issue before this Court.

The record does not support the contentions of Respondent as to the factual impact of the Carter-Leigon Agreement upon the jurisdictional dispute which arose at the Nevada Test Site in early 1964. The Carter-Leigon Agreement was executed by the Electricians' Union and Respondent Teamsters on February 29, 1952 to resolve a then extant jurisdictional dispute concerning specific permanent warehousing facilities then in use at the Nevada Test Site [T. Ex. 6A; R. 21; Tr. 1035-1037, 1693-1694, 2307, 2319-2320]. With the advent of underground testing in 1961 at the conclusion of the three-year unilateral moratorium on nuclear testing [Tr. 570, 441] an expanded system for the processing of construction and support work in the forward areas was instituted [Tr. 343-349]. The permanent warehouses of the type existing in 1952 and with respect to which the Carter-Leigon Agreement was executed are still being employed at the Nevada Test Site and are staffed and operated by personnel of Respondent [Tr. 901-908, 935, 936].

The advent of underground testing, however, necessitated the formation of a number of forward "compounds" or "staging areas" to facilitate the work in each of a number of testing areas [Tr. 343-349]. The

the Board has jurisdiction to interpret and apply contracts of this nature in connection with unfair labor practice charges and that the preemption argument is not available to remove this jurisdiction. [REECO Br. 17-19].

N.L.R.B. v. C. & C. Plywood Corp. (1967), 385 U.S. 421;

N.L.R.B. v. Acme Industrial Co. (1967), 385 U.S. 432.

Once this Court determines that the existence of the Carter-Leigon Agreement and the filing of a Section 301(a) suit based thereon does not remove the Board's jurisdiction of Charges which had been filed with it, the Carter-Leigon Agreement is without further significance in this proceeding. The Nevada Federal District Court properly stayed the proceedings before it in recognition of the Board's primary jurisdiction [G.C. Ex. 6F; REECO Br. 13, 14-17]. The Board considered and rejected Respondent's contention that the Carter-Leigon Agreement applied to the jurisdictional dispute and granted the work in question to the Teamsters [R. 78-79]. Respondent at no time either before the Board [R. 12] or before this Court [R. 61 *et seq.*] has questioned the adequacy of the evidence to support the Board's findings. As a result, a finding of no preemption disposes of all objections to enforcement of the Order based upon the Carter-Leigon Agreement.

B. Nevada Federal District Court Action.

On May 5, 1964, REECO filed the Charge with the Board which gave rise to this case [R. 3]. Subsequently, on May 11, 1964, REECO filed an Amended Charge. Thereafter, on May 21, 1964, Respondent filed its action with the Nevada Federal District Court

[G.C. Ex. 6A-6F]. The Nevada Federal District Court suit sought enforcement of an arbitration award arising under the Collective Bargaining Agreement between Respondent and REECO [T. Ex. 5, 13, 14, 15; G.C. Ex. 6A-6F]. The Electricians' Union was not a party to that Collective Bargaining Agreement and in fact had secured its own arbitration award conflicting with that obtained by Respondent pursuant to the Collective Bargaining Agreement between the Electricians' Union and REECO [IBEW Exs. 2A and 2B].

Respondent cites a number of general labor law decisions as indicating that a Federal District Court may compel arbitration of jurisdictional disputes under Section 301(a) [T. Br. 47-49]. What Respondent fails to point out is that these decisions did not involve the preemption issue being asserted by Respondent and in fact the *Carey v. Westinghouse Electric Corp.* (1962), 375 U.S. 261 decision relied upon by Respondent [T. Br. 48] contained additional pertinent language omitted in Respondent's brief:

> "Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, *the Board's ruling would, of course, take precedence;* and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301.
>
> * * * * *
>
> "*The superior authority of the Board may be invoked at anytime.* Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area" (Emphasis added).
>
> *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272.

Again, in relying upon *Carey v. General Electric Corp.* (2nd Cir. 1963), 215 F. 2d 499 [T. Br. 48], Respondent again failed to refer to an extremely relevant portion of the Court's decision which is set out on pages 15-16 of REECO's brief.

These decisions then, recognize a concurrent jurisdiction of the federal district courts to compel arbitration of the work dispute question even though one union involved in the dispute is not a party to the Collective Bargaining Agreement. These decisions *do not* involve the question of preemption nor do they involve the situation where Section 8(b)(4)(D) actions have been taken to coerce a resolution of the jurisdictional dispute. The decisions *do* specifically recognize the preeminence, precedence and binding jurisdiction of the Board where activities covered by the Act are involved [See REECO Br. 14-17].

Respondent's preemption argument is therefore narrowed down to the decision in *Square D Company v. N.L.R.B.* (9th Cir. 1964), 332 F. 2d 360. The *Square D* decision is unavailable to Respondent for a number of reasons. First, it has effectively been overruled by two Supreme Court decisions [REECO Br. 18-19].

> *N.L.R.B. v. C & C Plywood Corp.* (1967), 385 U.S. 421;
>
> *N.L.R.B. v. Acme Industrial Co.* (1967), 385 U.S. 432.

Second, it involved a dispute between the two parties to a Collective Bargaining Agreement concerning matters

covered by that agreement. Here, the dispute is between two unions only one of which is a party to the Collective Bargaining Agreement which gave rise to the arbitration award of which enforcement was sought in the Section 301(a) proceeding. Moreover, the Collective Bargaining Agreement in question specifically precludes the resolution of jurisdictional disputes through the arbitration process [T. Ex. 5 (Section II, Subparagraph D); R. 35 n. 23]. Third, unlike the *Square D* situation, the present dispute involved extensive concerted activity on the part of Respondent to enforce its demand [REECO Br. 7]. Fourth, the most recent decisions in the Courts of Appeals including the Ninth Circuit have determined that preemption of the type asserted by Respondent is not available to deprive the Board of jurisdiction [REECO Br. 19-21].

> See *American Fire Apparatus Company v. N.L.R.B.* (8th Cir. 1967), 380 F. 2d 1005;
>
> *N.L.R.B. v. Hutting Sash & Door Co., Inc.* (8th Cir. 1967), 377 F. 2d 964;
>
> *Honolulu Star-Bulletin, Inc.* (9th Cir. 1967), 372 F. 2d 691.

Fifth, in construing the requirements imposed upon the Board by Section 10(k), the Supreme Court in *N.L.R.B. v. Radio & Telev. Broadcast Eng. Union* (1961), 364 U.S. 573, specifically concluded that it is the obligation of the Board to hear and determine the merits of a jurisdictional dispute of the nature presented to it in the instant proceeding and which resulted in the Order for which enforcement

is presently being sought [N.L.R.B. Br. 20-21]. To adopt the position advanced by Respondent would ignore the very purpose of Section 10(k) and run contrary to the Supreme Court's decisions finding no preemption of the Board's jurisdiction under Section 301(a).

The Supreme Court has specifically ruled out the possibility of a preemption argument in connection with a Section 301(a) "contract" which does not contain any self-enforcing provisions, *i.e.,* the Carter-Leigon Agreement, and has apparently considered the presence of an arbitration provision, *i.e.,* REECO-Respondent and REECO-Electricians' Union Collective Bargaining Agreements, equally unpursuasive [REECO Br. 17-21]. Moreover, the Supreme Court in failing to accord any weight to the existence of an arbitration provision did so in a bi-partite situation. Here, Respondent is attempting to rely upon an arbitration award which did not bind the Electricians' Union and ran counter to the arbitration award obtained by the Electricians' Union under its Collective Bargaining Agreement which did not bind Respondent. This is precisely the situation where Section 10(k) was intended to apply and a situation in which preemption makes absolutely no sense.

C. Private Adjustment of Dispute.

Respondent argues that the Carter-Legion Agreement constituted a private adjustment of the jurisdictional dispute within the provisions of Section 10(k) of the Act thereby depriving the Board of jurisdiction [T. Br. 41-43]. A simple reading of Section 10(k)

clearly establishes that the voluntary adjustment contemplated therein is one entered into by the parties to a jurisdictional dispute to resolve the specific dispute in question at the time of the dispute. The Section provides in relevant part:

> ". . . [T]hat Board is empowered and directed to herein determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the *parties* to such dispute submit to the Board satisfactory evidence that *they have adjusted,* or agreed upon methods of voluntary adjustment of, the dispute. . . . [U]pon such voluntary adjustment of the dispute, such charge shall be dismissed." (Emphasis added).
>
> Section 10(k), 29 U.S.C. §168(k).

The voluntary settlement provision of Section 10(k) clearly does not apply to the 1952 Carter-Legion Agreement. The Electricians' Union at no time agreed to application of the Carter-Leigon Agreement to the presently disputed work.

D. Section 301(a) Suit as Prerequisite to Existence of Unfair Labor Practice.

Respondent argues that the jurisdictional dispute was not ripe for consideration by the Board in the absence of a finding by the Nevada Federal District Court of non-preemption [T. Br. 43, 49-50]. This argument is simply a restatement of Respondent's preemption argument based upon *Square D* and is unavailable to Respondent as has been discussed previously.

Conclusion.

For the reasons set forth in this Brief and in its Opening Brief, the Intervenor and Charging Party, Reynolds Electrical & Engineering Co., Inc., prays that this Court issue a decree enforcing in whole the Order of the National Labor Relations Board which is the subject of this Petition for Enforcement proceeding, and requiring Respondent, its officers, agents and representatives, to comply therewith.

Dated: May 23, 1968.

GIBSON, DUNN & CRUTCHER,
WILLIAM F. SPALDING,
STEPHEN E. TALLENT,
JACK H. HALGREN,
By WILLIAM F. SPALDING,
Attorneys for Reynolds Electrical & Engineering Co., Inc., Charging Party and Intervenor.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

William F. Spalding

No. 21,527

IN THE

United States Court of Appeals

For the Ninth Circuit

BRENT L. SELLICK,
Appellant,

vs.

CLIPPER YACHT COMPANY,
a corporation,
Appellee.

BRIEF FOR APPELLEE

I. LAURENCE POPOFSKY,
CURTIS M. CATON,
HELLER, EHRMAN, WHITE & MCAULIFFE,
44 Montgomery Street,
San Francisco, California 94104,
Attorneys for Appellee.

INAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Codes

Constitutions

Rules

Statutes

Texts

No. 21,527

IN THE

United States Court of Appeals

For the Ninth Circuit

BRENT L. SELLICK, *Appellant,* vs. CLIPPER YACHT COMPANY, a corporation, *Appellee.*	

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the Northern District of California which dismissed appellant's First Amended Libel primarily on the ground that appellant was precluded by the principles of res judicata from relitigating matters finally determined in an earlier action commenced by appellant against appellee involving the same subject matter in the courts of California.

The controversy has its genesis in appellee's attachment and attempted execution sale of the vessel "Hazzard II" in proceedings originally instituted by Clipper Yacht Company against appellant's conditional vendee, Frank Addison Helton, in the Municipal Court, Central Judicial District of Marin County, State of California. Appellant Sellick, in turn, filed

an action in the Superior Court of the State of California in and for the County of San Mateo against appellee contending that his rights as conditional vendor had been infringed by reason of the attachment. Appellant's claims were rejected after trial by the Court. The Findings of Fact, Conclusions of Law and Judgment After Court Trial filed October 27, 1964 in the California Superior Court proceedings form the predicate for appellee's res judicata defense.

So far as pertinent to jurisdiction, appellant appears to contend that he is not barred by res judicata since the proceedings in his Superior Court action were not before "a court applying admiralty law; inasmuch as no Court, other than a Court sitting in admiralty in rem has the jurisdiction to make any changes in ownership of a vessel". O.Br. p. 9.

Jurisdiction of the case below was invoked under 28 U.S.C. §1333. Jurisdiction of this Court is founded on 28 U.S.C. §§1291 and 1294.

STATEMENT OF THE CASE

A. The Background as Found by the California Superior Court.

Appellant sold the "Hazzard II" to Frank Addison Helton on or about October 2, 1957 on a conditional sales contract. On or about November 14, 1958 Helton entered into a contract with appellee for the berthing of the "Hazzard II" at the yacht harbor facilities operated by Clipper Yacht Company.[1] How-

[1]Unless otherwise indicated, facts relating to the nonprocedural matters appear in the Findings of Fact and Conclusions of Law filed October 27, 1964 in the San Mateo Superior Court. See First Supplemental Record on Appeal.

ever from and since June 1, 1962 Helton has not paid appellee for the wharfage and anchorage of the vessel.

On or about June 24, 1963 Clipper Yacht Company filed Action No. 20493 in the Municipal Court, Central Judicial District of Marin County, State of California, against Frank Addison Helton and the unknown co-owners of the vessel "Hazzard II" pursuant to the California Code of Civil Procedure §813 et seq. In accordance with those provisions, Clipper Yacht Company caused the "Hazzard II" to be attached by the Sheriff's Office of the County of Marin. Following service by publication and default by defendant Helton, judgment was entered on October 25, 1963 in favor of Clipper Yacht Company and against Frank Addison Helton for the accrued wharfage debt. The judgment also authorized Clipper Yacht Company to cause the "Hazzard II" to be sold in satisfaction of the debt.

Under authority of the Municipal Court Judgment, Clipper Yacht Company directed the Sheriff of Marin County to proceed to sell the "Hazzard II". Sale was duly noticed in accordance with the applicable provisions of law for December 26, 1963. However, at the time appointed for sale appellant Sellick advised the Sheriff of Marin County that he was legal owner of the vessel and desired to file a third party claim pursuant to California Code of Civil Procedure §689(b).[2]

---

[2]It may be observed parenthetically that appellant's suggested "solution" to the controversy (O.Br. 8) would have been effectuated by the vessel's sale on December 26, 1963 but for appellant's decision to file the third party claim.

In due course appellant Sellick lodged his third party claim with the Sheriff which claim was duly honored by appellee Clipper Yacht Company. On or about March 17, 1964 the "Hazzard II" was released by the Sheriff to appellant Sellick as legal owner by formal notice transmitted to and received by appellant in March 1964. (Finding of Fact No. 11.)

At all times during the period that the "Hazzard II" was under attachment, appellant Sellick had actual knowledge of the attachment and was entitled to obtain its release pursuant to the statutory provisions of California Code of Civil Procedure §813 et seq. and/or California Code of Civil Procedure §689(b). (Finding of Fact No. 12.) More, from the date of attachment through the date of release on Sellick's third party claim, the fair market value of the "Hazzard II" remained a constant $1500. (Finding of Fact No. 14.)

Since the date of release to appellant, Clipper Yacht Company, through its counsel of record, has repeatedly asked Sellick to remove the "Hazzard II" from appellee's yacht harbor facilities. On each and every occasion, however, appellant Sellick has replied that the Court decisions adverse to him were erroneous and that he would not take possession of the vessel or remove it from Clipper Yacht Company's facilities. Since the March 17, 1964 release the vessel has remained berthed at appellee's facilities but no payment therefor has been made.

B. The Antecedent Legal Proceedings.

After filing his third party claim with respect to the "Hazzard II", Sellick filed Action No. 108357 in the Superior Court of the State of California in and for the County of San Mateo on June 10, 1964. So far as it relates to Clipper Yacht Company, the complaint alleges that appellee and others "wrongly deprived plaintiff of the use and possession of [the Hazzard II] and converted the same to their own use". General damages in the sum of $8,000 were prayed.

Clipper Yacht Company answered by denying liability and counterclaimed for wharfage and anchorage due since June 1, 1962. Following trial before the Honorable James T. O'Keefe, judgment was entered on October 27, 1964 in favor of Clipper Yacht Company with respect to all claims asserted in appellant Sellick's complaint. The counterclaim was dismissed without prejudice. The judgment thus entered followed the entry of findings of fact, which are summarized in relevant part above, and conclusions of law.

Appellant Sellick did not file a timely notice of appeal with respect to the October 27, 1964 Superior Court judgment. That judgment is thus final.

Also following the appearance of appellant Sellick as third party claimant, appellant was served as a party defendant in the original Municipal Court proceeding pending in Marin County. Issue was joined by way of answer (Record p. 17) and trial was held before the Honorable Alvin H. Goldstein, Jr. On

November 27, 1965 judgment was entered in favor of Clipper Yacht Company and against appellant Sellick in the sum of $625, representing the reasonable value of the wharfage and dockage of the "Hazzard II" for the period from the March 17, 1964 release to the date of trial. (Record p. 27.) Appellant Sellick attempted to appeal the Municipal Court judgment on February 16, 1966 but the appeal was dismissed as untimely filed. Sellick's petition for certification to the Court of Appeal of the State of California was denied on October 5, 1966. (O.Br. p. 6.) Accordingly, the Municipal Court judgment is also final.[3]

C. The Proceedings Below.

On September 20, 1965 appellant Sellick filed his initial pleading in the United States District Court for the Northern District of California. (Record pp. 1-8.) The libel purports to state three causes of action although all are predicated upon the same factual circumstances. At base, libelant alleges that appellee invaded his property rights by attaching the "Hazzard II" in the original Marin County proceedings brought to collect the unpaid wharfage debt from libelant's conditional vendee.

The first cause of the original libel appears to be based on the theory that appellant is entitled to recover the "rental value" of the "Hazzard II" for

[3]It would seem that the claims at bar constitute compulsory counterclaims in the Municipal Court action under California Code of Civil Procedure §439. However, since the earlier California Superior Court judgment rests on the same facts, any estoppel arising from Sellick's failure to counterclaim is of academic interest only.

appellee's alleged "use" of the vessel from June 1, 1962 through at least October 1, 1965, or "until respondent releases it to Frank Helton or Virginia Helton". The nature of the purported "use" is nowhere described. Libelant shifts his damage theory in the second cause to seek compensation for appellee's alleged "negligence" in not drydocking the vessel while it was subject to attachment. This purported cause nowhere alleges that appellees were under a duty to drydock the vessel; nor does it state facts which could explain how such a duty could extend beyond the date of the vessel's release to Sellick as third party claimant. The purported third cause is based on the theory that Clipper Yacht Company interfered with vendor Sellick's rights in the vessel by attaching the same, thereby perpetrating the tort of conversion.

On October 12, 1965 appellee Clipper Yacht Company moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. (Record pp. 9-12; First Supplemental Record on Appeal.) The motion was based on the contention that the libel was barred by virtue of the findings and judgment entered in the San Mateo Superior Court proceedings.[4]

---

[4]The judgment roll in the San Mateo Superior Court action was placed before the United States District Court for the Northern District of California by way of the Affidavit of M. Laurence Popofsky filed October 12, 1962. This Affidavit was sufficient to enable the Court to take judicial notice of the prior proceedings between the parties. See *Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245 F.2d 67 (9th Cir. 1956); Fed. R.C.P. 43a; 5 Moore's Federal Practice 1343; California Evidence Code §§452 (d) and 453. The procedure also constitutes substantial compliance

On January 7, 1966 the Honorable William T. Sweigert entered an interim order requesting additional information including, in particular, "why libellant has not regained possession of the 'Hazzard II' since March 17, 1964 when, according to the judgment of the San Mateo Superior Court, the vessel was released to him". (Record pp. 19-20.) Appellant Sellick responded to the interim order on January 26, 1966 (Record pp. 21-25) and Clipper Yacht Company responded on January 19, 1966 (Second Supplemental Record on Appeal) and on February 1, 1966 (Record pp. 26-27). Appellee's response stressed that Clipper Yacht Company had repeatedly asked appellant Sellick to remove the vessel from its yacht harbor facilities following the March 17, 1964 Sheriff's return but that appellant steadfastly refused to do so because he believed the state Court judges to be in error.[5]

On May 16, 1966 the Honorable William T. Sweigert entered his Memorandum of Decision dismissing

---

with the provisions of 28 U.S.C. 1738. While appellant Sellick proffers numerous recollections of events occurring during the long course of the controversy (few of which correspond with the recollections of counsel for Clipper Yacht Company) Sellick has never contested the authenticity of the Superior Court judgment roll documents placed before the Court below.

[5]Appellee's January 19, 1966 response to the interim order included the Affidavit of M. Laurence Popofsky, one of appellee's attorneys, in which affiant stated:

> "Since March 17, 1964 respondent Clipper Yacht Company, through your affiant, has repeatedly asked libellant Brent L. Sellick to remove the vessel 'Hazzard II' from the yacht harbor facilities of respondent. On each and every occasion libellant Sellick has replied that the Superior Court decision in San Mateo County was wrong and that he would not take possession of the vessel or remove it from respondent's yacht harbor facilities. Since March 17, 1964 the vessel has been berthed and remains berthed at Clipper Yacht facilities."

the libel. (Record pp. 28-32.) In the opinion of Judge Sweigert, all claims with respect to acts occurring prior to the San Mateo Superior Court judgment were barred; that bar, however, might not extend "to libellant's claims of unauthorized use of the vessel by respondent and damage to the vessel as a result of respondent's negligence occurring subsequent to the date of said judgment". Since the motion for summary judgment was narrowly based on the doctrine of estoppel by judgment, leave was accorded to file an amended libel alleging a cause or causes of action "based on unauthorized use of the vessel by respondent and damage to the vessel as a result of respondent's negligence occurring *subsequent* to October 27, 1964". (Emphasis in original.)

On June 15, 1966 appellant Sellick filed a First Amended Libel. (Record pp. 33-38.) The amended pleading repeats virtually verbatim the first two causes of action of the original libel; no new facts with respect to negligent acts or unauthorized use are pleaded. However, the damages alleged differ: the first cause reduces the claim for rental from $15,800 to $7,900, the amended figure supposedly relating to the October 27, 1964-June 27, 1966 period only; inexplicably, the damages prayed with respect to the second cause are increased from the original $11,375 to an amount "in excess of $14,463.21".

The amended pleading contains no count for conversion, whether allegedly occurring prior to the San Mateo Superior Court judgment or after.[6]

---

[6]Contrast Appellant's Opening Brief, p. 10.

On July 15, 1966 appellees moved for dismissal of the amended libel pursuant to Rule 12(b)(6) and for summary judgment pursuant to Rule 56. (Record pp. 39-48.) The motion to dismiss was based upon the failure of appellant to file an amended pleading stating facts sufficient to constitute a cause of action either within the framework of the interim order or otherwise; the motion for summary disposition was based upon all documents previously filed, including the affidavits of appellee's counsel filed October 12, 1965 and January 19, 1966. These motions were denied without prejudice to renewal at a later date by the Honorable Stanley A. Weigel on August 1, 1966.[7] (Record p. 53.)

On September 7, 1966 appellee renewed its motions of July 15, 1966 based upon the same record, together with a new affidavit of M. Laurence Popofsky substantially repeating the substance of the January 19, 1966 affidavit. (Record pp. 61-65.) On October 4, 1966 the Honorable George B. Harris entered his Order granting respondent's motion on all grounds urged. (Record p. 66.) This appeal followed on November 4, 1966. (Record p. 67.)

---

[7]The denial was based upon a technical deficiency involving the absence of a notarization in the affidavit of M. Laurence Popofsky filed January 19, 1966. (See Record, p. 55, Reporter's Trans. 2.) Affiant was out of the country at the time of oral arguments before Judge Weigel and was thus unable to cure the defect in open court. Appellee is at a loss to understand appellant's reference to this matter appearing at page 13 of the Opening Brief.

QUESTION PRESENTED

Are appellant's claims barred by reason of the findings and the judgment entered in the Superior Court of San Mateo County coupled with the unchallenged fact that appellant has consistently refused to remove the "Hazzard II" from appellee's yacht harbor facilities at all times since the formal return of the vessel to appellant as third party claimant?

SUMMARY OF ARGUMENT

(1) The doctrine of estoppel by judgment applies to the findings and judgment entered in the San Mateo Superior Court in appellant's prior action against appellee. Appellant's state Court action did not infringe upon the exclusive jurisdiction of a federal admiralty tribunal.

(2) All claims advanced by appellant in both the original and amended libel have been finally concluded adversely to appellant in the state Court proceedings. So far as appellant attempts to advance a claim on the basis of facts occurring after the state Court judgment appellant is barred and estopped from recovery by reason of the unchallengeable state Court findings and the unquestioned fact that since March 17, 1964 appellee has repeatedly asked libelant Sellick to remove the "Hazzard II" from appellee's yacht harbor facilities but appellant has refused to do so.

ARGUMENT

As seen, libelant initially challenged appellee's attachment of the "Hazzard II" before the Superior Court of San Mateo County. There, after a Court trial, findings were entered establishing, *inter alia,* that at all relevant times libelant possessed the power under California law to obtain possession of the vessel by filing a third party claim under California Code of Civil Procedure §689(b). In fact, Sellick did precisely that on or about December 26, 1963. Thereafter, on or about March 17, 1964, the "Hazzard II" was formally released to third party claimant Sellick "as owner" by the Sheriff of the County of Marin. Inexplicably, Sellick thereafter refused to take possession of the vessel, electing instead to sue appellee for conversion.

But the Superior Court of the State of California would have none of it. In findings of fact and conclusions of law supporting the now final judgment, that Court held that appellee's attachment was proper, that no conversion occurred, that Sellick had incurred no damages even if there had been a technical conversion, that Sellick was barred from seeking damages by reason of the availability of third party claim procedures, that Sellick elected his remedy by lodging the third party claim with the Sheriff's Office of Marin County thereby effectuating a return of the vessel, and that, in all events, Sellick was estopped by his conduct from pursuing his claims against Clipper Yacht Company.

Now, defying the established principles of estoppel by judgment, appellant Sellick, appearing *pro se,* seeks to relitigate the claims already rejected by the forum of his own selection. To be sure, appellant Sellick has refurbished his claims with new damage theories in the hopes of evading the various tenets of the doctrine of res judicata. But such refurbishment aside, appellant's claims necessarily rest on the premise that he is entitled to relitigate both the facts and issues heard by the state Court. The determination that he may not do so, embodied in the judgment below, should be affirmed.

I.

THIS COURT SHOULD ATTRIBUTE ESTOPPEL EFFECTS TO THE FINDINGS AND JUDGMENT ENTERED IN THE PRIOR CALIFORNIA SUPERIOR COURT ACTION.

Appellant Sellick has had his day in Court—indeed, in a forum of his own choosing. He is entitled to nothing more.

The operative principles were established beyond all controversy in *Baldwin v. Iowa State Traveling Men's Assn.,* 283 U.S. 522, 75 L.Ed. 1244, 51 S.Ct. 517 (1931) where the Court said:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the results of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in

> every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." 283 U.S. at 525-6, 75 L.Ed.2d at 1247.

Under the full faith and credit clause of the United States Constitution (Article IV, Section 1), under the federal statute enacted to implement this constitutional provision (28 U.S.C. §1738) and under the principles of res judicata, this Court should accord dispositive effect to the final determinations of the California Superior Court.

Appellant, of course, recognizes the difficulty posed by the doctrine of estoppel by judgment. His putative escape from its effects consists of the argument that the state Court lacked jurisdiction over appellant's own suit inasmuch as a state Court cannot apply admiralty law "in an in rem action or anything affecting the vessel itself, including its title". (O.Br. p. 10; see also p. 13.) As appellee interprets the argument, appellant appears to believe that the state Court lacked jurisdiction over the subject matter of the Superior Court *conversion action* since appellee's *original attachment* affected or touched the title to the vessel—a matter he believes exclusively within federal maritime jurisdiction. Appellant's argument thus comes to this: having erred in filing his conversion action in a state Court thereby putting appellee in jeopardy, he is nonetheless entitled to relief from his mistake and may relitigate the entire matter in a federal forum.

While appellant's argument answers itself, it is appropriate to note those general principles which negate it in its entirety.

In the first place, appellant properly invoked the jurisdiction of the Superior Court of the State of California in his conversion action against Clipper Yacht Company. Under 28 U.S.C. §1333 libelant Sellick had the right to commence a proceeding *in personam* with respect to a maritime cause of action in either a state Court or a federal Court. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 90 L.Ed. 1099, 66 S.Ct. 872 (1946); *Reynolds v. Royal Mail Lines Ltd.,* 147 F.Supp. 223 (S.D. Cal. 1956); *Sun Harbor Marina Inc. v. Sellick,* 250 Adv.Cal.App. 347 (April 1967).[8]

Even were it possible that Sellick's first action exceeded the subject matter jurisdiction of California Courts thereby infringing upon the exclusive jurisdiction of the federal judiciary, the Superior Court's determination that it had jurisdiction to adjudicate the matter before it—a determination inherent in the judgment—is binding and conclusive. As stated by Mr. Justice Brandeis in *American Surety Co. v.*

---

[8]It is equally clear that, as the Superior Court of the State of California held, the original Marin County Municipal Court proceeding was within the jurisdiction of that Court. While federal admiralty courts have exclusive jurisdiction over maritime *in rem* proceedings in which the vessel is treated as the offender, attachment proceedings in a debt action in state Court do not infringe upon federal jurisdiction even though the property attached in connection with those proceedings be a vessel. *Rounds v. Clover Boat Foundry & Machine Co.,* 237 U.S. 303, 59 L.Ed. 966, 35 S.Ct. 596 (1915); *Olsen v. Birch & Co.,* 133 Cal. 479, 65 P. 1032 (1901); *Arques v. National Superior Co.,* 67 Cal.App.2d 763, 155 P.2d 643 (1945). The original Marin County action resulted in an *in personam* money judgment fully within the jurisdiction of the California Courts.

Baldwin, 287 U.S. 156 at 166, 53 S.Ct. 98, 77 L.Ed. 231, at 238 (1932):

> ". . . The principles of res judicata apply to questions of jurisdiction as well as to other issues."

See also *Durfee v. Duke,* 375 U.S. 106, 11 L.Ed.2d 186, 84 S.Ct. 242 (1963) applying this general rule to the issue of subject matter jurisdiction as well as jurisdiction over a defendant's person.

Conceivably, appellant desires to argue that there exists some exception to the applicability of res judicata here deriving from doctrines peculiar to federal maritime law. But appellant suggests no reason—and appellee is aware of none—for declining to apply the traditional rules of estoppel by judgment in the context of a controversy touching matters arguably maritime in character. There can be no doubt that res judicata traditionally applies to libels brought within the maritime jurisdiction of a federal Court. See, *e.g., Koziol v. The Fylgia,* 230 F.2d 651 (2d Cir. 1956); *cert. denied,* 352 U.S. 827 (1956); Restatement of Judgments, § 63, comment b, illustration 4. In other contexts actions within the exclusive jurisdiction of a federal Court have been held barred by virtue of findings and judgments entered in state Court proceedings arising out of the same or related subject matter. See, *e.g., Vanderveer v. Erie Malleable Iron Co.,* 238 F.2d 510 (3d Cir. 1956); *cert. denied,* 353 U.S. 937, 1 L.Ed.2d 760, 77 S.Ct. 815 (1956) (patent infringement action within exclusive jurisdiction of federal Court held barred by findings and judgment

in former state Court suit on a license contract); *Connelly v. Balkwill,* 174 F.Supp. 49; (N.D. Ohio 1959), *aff'd per curiam,* 279 F.2d 685 (6th Cir. 1960). (Rule X 10B-5 action within exclusive jurisdiction of federal Court held barred by findings and judgment in prior state Court fraud action).[9]

But the real burden of appellant's argument appears to be simply that the state Court erred in denying him money damages for the alleged conversion. (O.Br. 9-12.) However, it has long been clear that error provides no basis for withholding application of the principles of res judicata. The efficacy of a judgment simply does not depend upon its correctness. 1B Moore's Federal Practice 621. Indeed, the significance of the doctrine derives from this very feature: its application requires an aggrieved party to invoke his appellate remedies rather than engage in harassing and vexatious relitigation. As stated in *Rubens v. Ellis,* 202 F.2d 415, 418 (5th Cir. 1953):

> "The doctrine of *res judicata* does not depend upon whether or not the prior judgment was right. It rests upon the finality of judgments as a matter of public policy, to the end that controversies once decided shall remain in repose."

In sum, appellant's efforts to escape the doctrine of res judicata must be rejected. When those principles are applied at bar—as appellant all but recognizes in his brief—the judgment below must be affrmed.

---

[9]For additional recent cases involving federal court attribution of estoppel effect to state Court determinations see, e.g., *Flood v. Besser Co.,* 324 F.2d 590 (3d Cir. 1963); *Ballard v. First National Bank of Birmingham,* 259 F.2d 681 (5th Cir. 1958); *Lyle v. Bangor & Aroostook R.R. Co.,* 237 F.2d 683 (1st Cir. 1956).

II.

ALL CLAIMS ASSERTED AT BAR ARE NEGATED BY THE FINDINGS AND JUDGMENT ENTERED IN THE SAN MATEO SUPERIOR COURT AND THE POST-JUDGMENT REFUSAL OF APPELLANT TO REMOVE THE VESSEL.

Appellee relies upon the doctrine of res judicata in both of its familiar aspects:

(1) the principle that a prior judgment is an absolute bar to a subsequent action between the same parties upon the same claim or demand (res judicata strictly so-called), and

(2) the principle that a prior judgment constitutes an estoppel in a subsequent action between the same parties as to matters necessarily litigated and determined even though the subsequent action be upon a different claim or demand (collateral estoppel). See, *e.g.,* 1B Moore, Federal Practice 621, and authorities cited; Restatement of Judgments, §§45-72.

The first of these principles unquestionably precludes relitigation of appellant's "conversion" claim as well as his claims for "unlawful possession" and "negligence" at least so far as they relate to the period prior to the October 27, 1964 Superior Court judgment. As stated in *Flood v. Besser Co.,* 324 F.2d 590 at 591 (3d Cir. 1963):

> ". . . In such a case the plaintiff is precluded not only from asserting the grounds of complaint actually litigated in the prior suit but also all other grounds which were available to him but which were not put forward in that suit. The plaintiff may not prosecute his claim piecemeal by presenting to the court a part of his grounds and reserving others for another day. It is in the

interest of both the nation as a whole and its individual citizens that there should be an end to litigation and that an individual should not be vexed twice for the same cause. Thus, under the doctrine of res judicata a plaintiff may not split his cause of action by claiming in his original suit a part only of the damages which he is then allegedly entitled to recover and reserving the remaining damages for a later suit. If he does so the judgment in the prior suit bars him from recovering in another suit the damages which he could have claimed, but did not, in the original suit."

Whatever meaning one may attribute to Sellick's claims of "unlawful possession" and "negligence", it is surely clear that these claims are precluded by the San Mateo judgment. That judgment rests upon the following findings:

(1) that appellee acted in accordance with the provisions of law in attaching the boat;

(2) that appellee did not willfully deprive appellant without appellant's consent of the use and possession of the boat or any other personal property;

(3) that appellee did not convert the boat and did not otherwise violate plaintiff's rights in his personal property;

(4) that appellee did not cause damage to the vessel by reason of the attachment inasmuch as the fair market value of the "Hazzard II" remained constant at all relevant dates through and including the Sheriff's return and the date of trial in San Mateo County;

(5) that even if Sellick's rights were theoretically invaded by reason of the attachment, appellant is estopped from seeking recovery for any injury by reason of his failure to promptly file a third party claim or, alternatively, by reason of his election to obtain release of the vessel as legal owner through a third party claim.

To be sure, appellant Sellick has been adroit enough to plead theories which may appear to involve claims distinct from those litigated in the San Mateo action. But neither the federal nor the state courts have had any difficulty in piercing pleading theory so as to apply the doctrine of res judicata to the selfsame claim. See, *e.g., Filice v. U.S.,* 271 F.2d 782 (9th Cir. 1959); Restatement of Judgments §§ 48, 61-66. The point may be illustrated by two California cases: *Wick v. Wick Tool Co.,* 176 Cal.App.2d 677, 1 Cal. Rptr. 531 (1959), and *Stafford v. Yerge,* 129 Cal.App. 2d 165, 276 P.2d 649 (1954).

In *Wick v. Wick Tool Co., supra,* rescission of a license agreement was initially sought on six specified grounds of alleged false representations. The Trial Court found that no false representations had been made in inducing the entry into the license agreement. Plaintiff tried again. In a second action damages were sought on two specified grounds involving additional false representations. But the California Court of Appeal perceived that the alleged right to recover was once again based on circumstances involved in the making of the license agreement. Accordingly, the Court held res judicata applicable notwithstanding the

fact that different relief was sought. Similarly, the bar of res judicata applied even though the two additional grounds of false representation were allegedly not discovered until after the adverse judgment in the first action became final. In the Court's view the plaintiff in the first action was obliged to allege all purported grounds of rescission discoverable with due diligence; he was not entitled to split his cause of action for relief with respect to the license agreement by presenting certain grounds for relief in the first action and thereafter presenting, in a second action, other grounds for relief.

Here, as in *Wick,* appellant has devised new theories of relief; but all are grounded in the same factual circumstances, namely, Clipper Yacht Company's alleged wrongful attachment of the "Hazzard II". Whatever theoretical artifact Sellick chooses to describe the same basic facts, he cannot escape the doctrine of res judicata.

Equally instructive is the earlier decision of *Stafford v. Yerge, supra.* There, a fraud claim with respect to the conveyance of certain oil and gas leases was repeated in two actions. In the first, plaintiffs claimed the right to royalties and demanded an accounting. In the second, plaintiff assignee of the original plaintiffs recast his action to seek declaratory relief and a determination that plaintiff was a co-tenant with certain defendants who, it was alleged, held the royalties in trust for the plaintiff. Holding that the new suit was barred by the doctrine of res judicata, the California Court of Appeal rejected plaintiff's

argument that res judicata requires an identity of theories upon which relief is sought. Invoking the well-recognized principles discussed above, the Court held that the relevant identity is between the causes of action, not the theory of relief:

> ". . . Plaintiff's request for a declaration of the rights of the parties, for a determination that he is a cotenant of the well, and that the royalties be held in trust for him, relates to the remedy by which plaintiff seeks to enforce his asserted right. This does not obviate the application of the doctrine of res judicata. (*Triano v. F. E. Booth & Co., Inc.,* 120 Cal.App. 345, 347 [8 P.2d 174]; *Panos v. Great Western Packing Co., supra,* p. 639.) Otherwise a party could keep litigating the same claim over and over so long as he, or his counsel, was ingenious enough to contrive new theories. The right or obligation here sought to be enforced is clearly the same as that adjudicated in the *Howard* case. Res judicata was therefore applicable." 129 Cal.App.2d at 171-72.

As the California Appellate Court appreciated, the purpose of both suits in *Stafford* was to obtain a portion of the royalties on the oil produced from a certain well. Although different relief was sought and new allegations were incorporated in the second complaint, the Court peremptorily ended the harassing and vexatious litigation by applying the res judicata doctrine. Here too, similar harassment must be ended and for the same reasons. Notwithstanding plaintiff's new theory of damages, he nevertheless seeks recovery for an alleged invasion of his rights in and to the "Hazzard II"—the very same set of circumstances

before the Superior Court of San Mateo County. Sellick has had his "go" at this appellee; he is not entitled to another.

Both aspects of the doctrine of res judicata preclude Sellick's efforts to pursue claims with respect to damages supposedly incurred after entry of the San Mateo Superior Court judgment. As clearly appears in Appellant's Opening Brief, the claim of "continuing damage" presupposes that the San Mateo findings are erroneous and that the issues therein determined may be relitigated in this forum. *Each and every theory upon which Sellick seeks recovery rests upon the assumption that Clipper Yacht Company perpetrated a wrongful act in connection with its attachment of the "Hazzard II"—an assumption foreclosed by the San Mateo Superior Court.* The point may be illustrated by that portion of appellant's brief concerning "conversion". Without reference to the record appellant argues:

> "If the state and federal court feels that conversion did not occur prior to the judgment of the Superior Court, County of San Mateo, then it has occurred since then as the conditional vendor has been excluded from his rights by appellee's continuing to hold the vessel. Of course, conditional vendees, the Heltons, dod [sic] not pay on the contract when they do not have the vessel." O.Br. p. 10.

But appellant nowhere explains in what manner appellee has "excluded" him from his rights as conditional vendor. The record establishes exactly the opposite to be true. Appellee has not and does not

challenge appellant's title to the vessel as legal owner. Indeed, when appellant filed his third party claim appellee honored it. Since the vessel's release to appellant on March 17, 1964—*a date preceding the San Mateo judgment by some seven months*—Sellick has enjoyed and continues to enjoy the right to take custody of the vessel and do with it as he chooses. But appellant has belligerently refused to remove the vessel insisting, instead, that the San Mateo judgment is erroneous. *As a matter of law appellant cannot have suffered any legal damage to his interests by reason of any acts or omissions of appellee. Any damages he may have incurred including any deterioration in the state of the vessel following the Sheriff's return of March 17, 1964 is proximately attributable to Sellick's own refusal to accept the necessary consequences of his own third party claim.*

Beyond the findings and the judgment of the San Mateo Superior Court looms the unquestioned fact that since March 17, 1964 Clipper Yacht Company has repeatedly asked libellant Sellick to remove the "Hazzard II" from appellee's yacht harbor facilities. Yet appellant has steadfastly refused to do so.[10] Once

---

[10]Appellee is at a loss to understand what Sellick means when he asserts that "Appellee still continues to hold the vessel, use the vessel, are allowing damage to the vessel to continue and have still not released the vessel to the Heltons." O.Br. p. 9. So far as appears in this record since June 1, 1962 conditional vendee Helton has not contacted Clipper Yacht Company or shown any interest in the vessel. Significantly, appellant has never denied that he has consistently refused to take the boat away even though asked to do so by appellee. See Reporter's Transcript of Oral Argument on October 3, 1966 before the Court below, p. 5 et seq. On November 18, 1966 appellee filed action No. 47030 against appellant in Marin County Superior Court seeking wharfage fees for the post-

again it is clear that any damages Sellick may have incurred since March 17, 1964 are proximately caused by his own failure to accept appellee's invitation to take the vessel.

In sum, the findings and judgment of the San Mateo Superior Court coupled with appellee's repeated requests to libellant seeking removal of the vessel are dispositive of all claims. No genuine issue with respect to any material fact appears in the record.[11] Accordingly, judgment was properly entered below pursuant to Rule 56 of the Federal Rules of Civil Procedure.

September 30, 1965 period, an injunction directing removal of the vessel and punitive damages. See O.Br. p. 7. Sellick appeared by way of Answer and Cross-Complaint and the matter was tried before the Honorable Thomas F. Keating, who entered his Minute Order indicating judgment for Clipper Yacht Company on June 19, 1967. On June 23, 1967 appellant Sellick filed a Petition for Removal to the United States District Court for the Northern District of California (No. 47313).

[11]The record demonstrates that libellant could not file an amended pleading complying with Judge Sweigert's interim order. The amended libel adds nothing to the original by way of fact allegations supporting any claims for the post-October 27, 1964 period; nor could it in view of appellant's own refusal to take possession of the vessel. Accordingly, the first cause of the amended libel does not and cannot provide any actionable basis, whether contractual or quasi-contractual, for a claim against appellee for the vessel's "unauthorized use". As for the second cause of the amended pleading, appellant has not and cannot allege facts showing any duty on the part of appellee to care for the vessel the breach of which might constitute negligence.

CONCLUSION

For the reasons stated herein it is respectfully submitted that the judgment below be affirmed.

Dated, San Francisco, California,
June 28, 1967.

M. Laurence Popofsky,
Curtis M. Caton,
Heller, Ehrman, White & McAuliffe,
Attorneys for Appellee.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

M. Laurence Popofsky,
Attorney for Appellee.

NO. 21529

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ILDIKO NAGY,

Appellant,

vs.

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

APPELLANT'S BRIEF

MAZIROW & SCHNEIDER

Suite 919
8500 Wilshire Boulevard
Beverly Hills, California

Attorneys for Appellant,
Ildiko Nagy

NO. 21529

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ILDIKO NAGY,

Appellant,

vs.

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

APPELLANT'S BRIEF

MAZIROW & SCHNEIDER

Suite 919
8500 Wilshire Boulevard
Beverly Hills, California

Attorneys for Appellant,
Ildiko Nagy

TOPICAL INDEX

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

NO. 21529

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ILDIKO NAGY,

Appellant,

vs.

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

APPELLANT'S BRIEF

Appellant, a twenty-one year old single female, is a native and citizen of Hungary. That on December 1, 1964 she entered the United States at New York, New York as a non-immigrant visitor and was authorized to remain in the United States until September 15, 1965. On November 26, 1965 appellant was granted the privilege of a voluntary departure in lieu of the institution of deportation proceedings, such departure to be effective on or before December 6, 1965. Appellant did not depart from the United States, pursuant to an Order to Show Cause and Notice of Hearing dated February 9, 1966 which hearing was scheduled on February 17, 1966.

At said Order to Show Cause hearing and its several continuances, the appellant made an application for adjustment of her status to that of a permanent resident pursuant to Section 245 of the Immigration and Nationality Act (8 U. S. C. 1255) and requested temporary withholding of her deportation pursuant to Section 243(h) of the Immigration and Nationality Act.

The hearings on this matter proceeded to several continued dates, Reese B. Robertson, Esq. appearing for the Service and the respondent, now appellant, appearing in pro per. On July 15, 1966 a special inquiry officer, Louis L. Mattel denied appellant's requests for adjustment of status pursuant to Section 245 and denied the withholding of deportation under Section 243(h) of the Act. Said special inquiry officer further ordered that in lieu of an order of deportation, the respondent-appellant be granted voluntary departure without expense to the government. Thereafter, on July 22, 1966 appellant, through counsel, filed a Notice of Appeal to the Board of Immigration Appeals. Said appeal was denied by decision of the Chairman of the U. S. Department of Justice, Board of Immigration Appeals and was served upon appellant on or about November 30, 1966. This appeal is from the decision of the United States Department of Justice, Board of Immigration Appeals.

QUESTIONS FOR THE COURT

1. Did the appellant produce sufficient facts to invoke stay of deportation under Section 243(h) of the Immigration and

Nationality Act.

2. Was appellant entitled to adjustment of status to permanent resident under Section 245 of the Immigration and Nationality Act.

3. Was appellant denied due process in the hearing before the special inquiry officer.

I

REGARDING THE STAY OF DEPORTATION UNDER SECTION 243(h) OF THE IMMIGRATION AND NATIONALITY ACT.

Section 243(h) of the Immigration and Nationality Act since 1965 provides that the Attorney General is authorized to withhold deportation of an alien if such alien would be subject to persecution on account of (a) race, (b) religion, (c) political opinion. The case of Dunat v. Hurney, 297 F. 2d 744 (3rd Cir. 1961) added one further element, that is, the complete withdrawal of all economic opportunity as being tantamount to persecution under Section 243(h). It is contended herein that appellant would be persecuted on account of her political activity, her religious practice and by the imposition of extreme economic hardship.

On Page 5 of the Decision of the United States Department of Justice, Board of Immigration Appeals, it contends that appellant is "politically unimportant person". Further, it is concluded that appellant took no part in political activity either in Hungary or in the United States. The transcript of the hearing before the special

inquiry officer contains numerous references to her active disobedience, in that, the appellant has refused during her employment to join any political activist group. Appellant testified [Transcript, p. 12, lines 5-7] that even in high school she refused to join a Communist youth group called "Kis". As a person who just entered the labor market in Hungary, the Transcript [p. 15, lines 19-22] further indicates appellant's refusal to join any organization which had a political motivation. Appellant stated that at her place of employment "they wanted to force me to join the young people's Communistic organization in this factory, but I didn't want to join them". Further, appellant testified that the communist party leader was aggravated at appellant and did in fact make attempts to block her departure from Hungary [Transcript, p. 18, lines 1-5] although said efforts failed due to time limitation. It was further emphasized that Mr. Valko, an apparent leader of a Communist organization, was personally involved with the appellant, in that said person intimidated the mother of the appellant. Appellant unequivocally testified that her political ideas, to wit: her love for the United States was expressed to her supervisor and that she was quite vocal for her praise of the United States [Transcript, p. 21, lines 20-23; p. 20, lines 5-7].

It must be noted that appellant, at the time of her departure from Hungary was merely 19 years of age and had just entered the labor market in Hungary. It would be totally unreasonable to expect greater political involvement on a person of such tender age. Nonetheless, it is evident from the aforesaid, that appellant did, in a

negative manner, make evident her displeasure at Communist activities, organizations and her employment, which was dominated by politically activated people.

There is ample evidence to sustain appellant's position that she would be persecuted on her return to Hungary on account of her religion. Admittedly, the majority of Hungarian people are of Roman Catholic faith, but, it was not established as to the proportion of such peoples who actively participate in their faith. Appellant testified [Transcript, p. 14, lines 7-18] that she would, in fact, be persecuted, not because she is of the Roman Catholic faith, but because she actively practiced such faith. Further, it was brought before the special inquiry officer that the Communist political and pseudo-political officials paid special attention to those people who practice their religion and that such persecution is usually manifested by the inability of such person to receive a job commensurate with their training and/or ability. It was brought out [Transcript, p. 14, lines 14-18] that the appellant received a "lower position" and that despite her high school and one year of college chemistry training, she was required to work as a bottle washer.

The Dunat case (see above) indicated that there must be a complete withdrawal of all economic opportunity in order that it be tantamount to persecution under Section 243(h) of the Immigration and Nationality Act. Further, it is conceded that mere economic disadvantages are not considered persecution under the cases and the laws prior to the present adoption of Section 243 in 1965. It is respectfully submitted that all of the cases requiring complete

withdrawal were decided at the time Section 243(h) required "physical persecution". Since 1965 the requirement of physical persecution has been eliminated. The appellant would not be deprived of all economic opportunity, but, as it is clear by the evidence presented, she would be compelled to do only menial jobs and under the present status of this Section, it is submitted that same would be persecution.

It must be recognized by the Honorable Court that the appellant was without representation at all stages of the hearings. That evidence of greater weight could have been submitted by the appellant were it not for her total lack of understanding of the evidence requested of her, her tender age, and her lack of funds to employ counsel. For these reasons, the Transcript of the hearing must be taken most favorably to appellant and it must be recognized by the Honorable Court that the Service did not bring forth any evidence to the controvention of the facts elicited by the appellant. In Sovich v. Esperdy, 319 F. 2d 291 (2nd Cir. 1963) which was decided prior to the present wording of Section 243(h) is also relevant herein. The letter from the Department of State (Exhibit 4) clearly points out that under the Hungarian law, the appellant is in violation thereof for failing to return to said Country and that the penalties are very severe. The severity noted in said Exhibit together with the apparent animosity of her supervisor, Mr. Valko, and her refusal to join any Communist organization will certainly be determinative of her penalty. The Sovich case states, in part, as follows:

"We are unwilling to believe, however, that Congress has precluded from relief under Section 243(h), to an alien threatened with long years of imprisonment, perhaps even life imprisonment, for attempting to escape a cruel dictatorship. Such a construction of the statute would attribute to Congress, an insensitivity to human suffering wholely inconsistent with our national history. We hold, therefore, that the Attorney General, through his delegate, erroneously construed the limits of his discretion in ruling that imprisonment for illegal departure may never constitute "physical persecution" within the purvue of Section 243(h)."

In said case, as in the case at bar, the severity of the penalty coupled with the persecutions on account of political activity, religious practice and employment discrimination would certainly be sufficient to invoke a stay of deportation under Section 243(h).

II

REGARDING THE ADJUSTMENT OF STATUS UNDER SECTION 245 OF THE IMMIGRATION AND NATIONALITY ACT.

In order for appellant to be elligible for the benefits of Section 245 of the Immigration and Nationality Act, the appellant is required to establish that a visa is readily available to appellant and under provisions of 8 C. F. R. 245. 1, the appellant must present a certification issued by the Secretary of Labor under Section 212(a)

(14) of the Act. The decision of the special inquiry officer dated July 15, 1966 and specifically page 3 thereof, indicates that the visa office of the department of State for the month of July discloses that the quota for Hungary is open in all preferences and non-preference categories and thus, that portion of the appellant's requirement has been met. Evidence at the continued hearing held on July 15, 1966 indicated that on July 11, 1966 (four days prior to said hearing) appellant received a license as a cosmetologist from the State of California [Transcript p. 33, lines 14-16]. It was evident that the receipt of the license from the State of California was a condition precedent to the receipt of a clearance by the Department of Employment. It is respectfully submitted that the special inquiry officer should have continued the hearing for approximately thirty days enabling the appellant to obtain such clearance. Were it not for the lack of continuance, the appellant would have received such labor clearance and would have met all of the requirements of Section 245 of the Immigration and Nationality Act.

III

REGARDING THE DENIAL OF DUE PROCESS OF LAW TO APPELLANT.

The Courts have consistently held that an alien in deportation proceedings is entitled to due process. See Sunjka v. Esperdy (D. C. N. Y. 1960), 182 F. Supp. 280; Blazina v. Bovehard (C. A. N. J. 1961), 286 F. 2d 507.

At all of the hearings, appellant was informed by the special inquiry officer as to her right to representation by an attorney at "no cost to the United States Government" [Transcript, p. 1, lines 10-12]. The appellant, due to her age and her lack of funds, proceeded without an attorney through an interpreter.

It is respectfully submitted, that the appellant, then, a 21 year old single female, unversed in the processes of law, the procedural aspects to be taken and the gravity of the proceedings, should have been afforded legal counsel at the expense of the Government. Although deportation proceedings are civil in nature, the possibility of incarceration during deportation proceedings and the penalty of deportation makes the deportation procedures quasi criminal in fact. It is respectfully submitted that the most recent cases, to wit: the Dorado, Escobedo and Miranda clearly reveal the Supreme Court's thinking in that, the right of representation by a criminal defendant has been made explicit. An alien, such as the appellant herein, being faced with the return to a hostile environment and the substantial probability of long imprisonment makes these decisions applicable to the proceedings herein.

The importance of legal representation for no other purpose but to request a continuance for appellant at the time that appellant received her license as a cosmetologist by the State of California, clearly indicates the importance of such representation.

IV

CONCLUSION

Appellant has demonstrated and the facts attest to same, that the appellant would be persecuted and that an adjustment of status would have been granted were appellant advised of the continuance that she undoubtedly would have received were she asked for same. Appellant requests that the Honorable District Court reverse the decision of the United States Department of Justice, Board of Immigration Appeals and to withhold the deportation of the appellant under Section 243(h), or in lieu thereof, or in addition thereto, give appellant an opportunity to adjust her status to that of a permanent resident under Section 245(h).

Respectfully submitted,

MAZIROW & SCHNEIDER

By: THOMAS SCHNEIDER

Attorneys for Appellant,
Ildiko Nagy.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Thomas Schneider
THOMAS SCHNEIDER

NO. 21530

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE PEELE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

NO. 21530

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE PEELE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 21530

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE PEELE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT AND STATEMENT OF THE CASE

On August 30, 1954, appellant was convicted in the United States District Court for the Southern District of California, Central Division, upon his plea of guilty to a two-count information charging him with violating Title 18, United States Code, Section 2113(a). He was sentenced on that date, by the Honorable William C. Mathes, to a period of imprisonment of 18 years on Count One and five years on Count Two, said sentences to run consecutively [C. T. 3, 18]. 1/ Appellant had been represented by an attorney at

1/ C. T. refers to Clerk's Transcript of Record on Appeal.

all stages of the proceedings [C. T. 14].

On May 12, 1966, appellant filed a Motion pursuant to Section 2255 of Title 28, United States Code, claiming the United States Attorney had made unfulfilled promises to the petitioner that "if (petitioner) would waive the indictment (Case No. 23740) charging petitioner in violation of Title 18 U. S. C. §2113(d), and would thereafter enter a plea of guilty to an information in two counts, charging petitioner in violation of Title 18, United States Code, Section 2113(a)", the Government would (1) concede that the petitioner had not used a revolver in the perpetration of the offense, and (2) recommend to the court at the time of sentencing that a ten year sentence be imposed on each count, both counts to run concurrently [C. T. 4-5].

On October 31, 1966, the Honorable William M. Byrne, United States District Judge entered an order denying the petitioner's motion [C. T. 18-20].

Appellant filed his Notice of Appeal on October 31, 1966, together with his designation of record on appeal and statement of points [C. T. 21-24].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 2113(a) and 3231, and Title 28, United States Code, Section 2255.

This Court has jurisdiction to review the judgment of the District Court denying appellant's motion pursuant to Title 28, United States Code, Sections 1291, 1294 and 2255.

II

STATUTES INVOLVED

Title 18, United States Code, Section 2113(a) provides, in pertinent part as follows:

> "Whoever, . . . by intimidation, takes . . . from the person or presence of another any property or money . . . belonging to, or in the care, custody, control, management, or possession of, any bank . . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

Title 18, United States Code, Section 2113(d), provides:

> "Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."

Appellant's motion, the denial of which is the basis of the instant appeal, was made pursuant to the provisions of Title 28, United States Code, Section 2255, which, in pertinent part, provides:

> "A prisoner in custody under a sentence of a court established by Congress claiming the right

to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . ., or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

* * *

"An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment or application for a Writ of Habeas Corpus. . . ."

III

STATEMENT OF FACTS

The Reporter's Transcript of the sentencing proceedings, as set forth in petitioner's motion below, discloses the following exchange between the court, and the Assistant United States Attorney, Mr. Harris:

"MR. HARRIS: In this matter, I have discussed the matter with defense counsel Mr. Rhodes. He is agreeable that the defendant waive indictment, and information to be filed charging the defendant with the violation of Title 18, Section 2213(a).

"It seemed that according to the defendant he had a wooden or plastic pistol rather than an

actual pistol; although the testimony of our witnesses thought it was an actual pistol. On the basis of that he was indicted under Section 2113(d), use of a - - to put a life in jeopardy by use of a dangerous weapon.

"It is agreeable with the Government that an information in the two counts be filed charging him with a violation of 2113(a).

"THE COURT: That will be the same, I take it, as Counts - -

"MR. HARRIS: Three and Four, your Honor.

"THE COURT: Counts Three and Four of the indictment in Case 23740, except omitting the last paragraph, namely, the paragraph that reads, 'In committing the offense heretofore charged defendant Willie Peele did assault and put in jeopardy a life of another person . . ." et cetera.

"MR. HARRIS: That is correct.

"THE COURT: . . . by use of a dangerous weapon or device, namely, a revolver."

(Reporter's Transcript, Los Angeles, California, Monday, August 2, 1954). [C. T. 6-7].

Thereafter, in his Order Denying Motion Pursuant to Section 2255 of Title 28, United States Code, Judge Byrne specifically stated that, even disgarding the affidavits of the two Assistant United States attorneys involved in the proceedings of 1954 denying any promises had been made to petitioner, (1) no hearing on the facts

was necessary in this case and it could be decided solely on the record [C. T. 19]; (2) that the motion and the files and records of the case conclusively showed that the petitioner's plea of guilty was voluntary [C. T. 19]; and (3) that petitioner was entitled to no relief [C. T. 20].

IV

ARGUMENT

NO HEARING WAS NECESSARY WHERE THE MOTION AND THE FILES AND RECORDS OF THE CASE CONCLUSIVELY SHOWED THAT THE PRISONER WAS ENTITLED TO NO RELIEF.

The exitence of power to produce the prisoner does not, of course, mean that he should be automatically produced in every Section 2255 proceeding, or that a hearing need always be held. Whether a prisoner should be produced and a hearing held depends upon the issues raised by the particular case, for Section 2255, Title 28, United States Code, provides that no hearing is necessary where "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief". Cf. United States v. Fleenor, 177 F. 2d 482 (7th Cir. 1949).

In the instant case, the court made a specific finding that such a conclusive showing had been presented, and pointed out that:

> " . . . assuming the truth of petitioner's statement that the United States Attorney promised him that if he entered a plea of guilty to § 2113(a), the

Government would concede that he was not armed with a dangerous weapon, that is exactly what was conceded when the plea was accepted to § 2113(a) and the §2113(d) charge was dismissed." [C. T. 19, the court's emphasis.]

And the order denying petitioner's motion went on to state that:

"... the portion of the transcript quoted by petitioner clearly indicates the court was not under the impression that the charge was that the offense was committed with a loaded revolver when, in reply to counsel's statement, '... it's the defendant's position that he used a plastic pistol and not a revolver, ...,' the court replied, 'that's the reason the information was filed charging him with a violation of § 2113(a), whereas the indictment charged him with a violation of section 2113(d).'" [C. T. 19].

Thus, the record itself disclosed that no alleged promises to the defendant had been violated. The petitioner received exactly what he claimed to have been promised.

Similarly, the record itself belied the petitioner's claim for relief on the grounds of alleged promises of a recommendation by the United States Attorney for a lesser-than-maximum sentence.

Again, the Reporter's Transcript, as quoted in Petitioner's Motion below, indicates that the Assistant United States Attorney representing the Government at the time of sentencing, Mr. Bevan, told the court it was "the Government's position that in respect to a case of this nature the maximum sentence should be imposed" [C. T. 8].

The record does not disclose that this recommendation was objected to either by the defendant or by his attorney at that time. Yet, the petitioner contended, in his motion under Section 2255, that, "The foregoing colloquy between the court and Mr. Bevan, the United States Attorney in the instant case, makes it crystal clear that his previous representation to petitioner on the 2nd day of August, 1954, that he would recommend a sentence of ten (10) years in return for petitioner's pleas of guilty to the information (was made and not honored)." [C. T. 8].

This colloquy served not to support the appellant's contention, but rather it operated as a total discredit. The Government did not recommend a lesser-than-maximum sentence, nor did the Government remain mute -- instead, <u>the maximum sentence was requested by the United States Attorney.</u> In light of the fact that nothing was said to the court, either by the defendant or by his attorney, of any contrary earlier promises, the record can only be viewed as conclusively negating the petitioner's claim. And this posture of the record was further crystallized when the petitioner filed his motion under Section 2255 but never submitted an affidavit of his previous attorney who, the petitioner said, was

present when the Government was supposed to have made the alleged promises.

It has been repeatedly held that where "the factual allegation is contradicted by the record made by the movant during the criminal proceeding, he is entitled to no relief and his motion may be dismissed without a hearing." Lynott v. United States, 360 F. 2d 586, 588 (3rd Cir. 1966).

Here, the defendant and his counsel had every opportunity to tell the court of any promises or coercion used to induce his plea. "A defendant, having been represented by competent counsel, having been given every opportunity and right afforded by the law and having entered a plea of guilty, may not, without some reasonable basis, come into court years later and repudiate his prior plea. It is not the intent of Section 2255 nor the meaning of United States v. Hayman, to require a hearing upon the mere assertion that a prior plea was false." Burgett v. United States, 237 F. 2d 247, 251 (8th Cir. 1956), cert. denied 352 U. S. 1031, 77 S. Ct. 596. In the instant case, almost twelve years had elapsed before any claim was made that the plea was induced by a promise as to sentence. And such claim was directly contradicted by any reasonable reading of the records and files of the case. There was, therefore, no need to hold a hearing. Machibroda v. United States, 368 U. S. 487, 495 (1962).

V

CONCLUSION

A review of the record and files of this case discloses no error prejudicial to the rights of appellant and, accordingly, the judgment below should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.
WILLIAM J. GARGARO, JR.

No. 21532

IN THE

United States Court of Appeals

For the Ninth Circuit

MAUK SEATTLE LUMBER CO.,
Appellant,

v.

ALCAN PACIFIC CO.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

BRIEF OF APPELLANT

CASEY & PRUZAN
Attorneys for Appellant

Office and Post Office Address:
30th Floor, Smith Tower
Seattle, Washington 98104

METROPOLITAN PRESS SEATTLE, WASH.

SUBJECT INDEX

TABLE OF AUTHORITIES

Table of Cases

Page

Statutes

Other Authorities

IN THE

United States Court of Appeals For the Ninth Circuit

MAUK SEATTLE LUMBER CO.,
Appellant,

v.

ALCAN PACIFIC CO.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a money judgment entered by the Honorable Raymond E. Plummer, sitting without a jury, rendered in favor of the appellee. The jurisdiction of the District Court was based upon diversity of citizenship under 28 U.S.C. 1332. Appellee was a corporation organized under the laws of the State of Alaska, with its principal place of business in Alaska. Appellant was a corporation organized under the laws of the State of Washington, with its principal place of business in Washington. The jurisdictional allegations of the complaint are found in Paragraph I thereof (R. 1), which allega-

tions were admitted in appellant's answer, Paragraph I (R. 50), and which were found by the court in Paragraph I of the Findings of Fact (R. 298).

The jurisdiction of the Court of Appeals is based upon 28 U.S.C. 1291. Final judgment for the appellee was entered on November 4, 1966 (R. 326) and Notice of Appeal was given by appellant on November 28, 1966 (R. 335).

STATEMENT OF THE CASE

In April, 1961, the appellee, Alcan Pacific Co., was awarded a contract with the United States Government to construct additional military housing at Ft. Greeley near Fairbanks, Alaska. The project included eight buildings, one building addition and associated utilities (R. 298-299, Finding No. 2).

The appellant Mauk Seattle Lumber Co., a lumber broker, undertook to supply the lumber and plywood requirements for the project (R. 299, Finding No. 3).

One item of these requirements was Type II ⅜-inch plywood siding, 1860 pieces, at a price of $6,249.60. This case involves only this Type II siding which is hereafter referred to as simply "siding" (R. 299, Finding No. 4).

The initial shipment of 1860 pieces of siding arrived at the jobsite in late May, 1961. The appellee's superintendent examined the shipment and admitted it then looked "very bad," but did not get a decision on the material from the Government Resident Engineer prior to commencing application in late June (Tr. 333). The Govern-

ment's prompt rejection of the siding on July 1st and a formal stop order on July 3rd were ignored and appellee continued to apply the material (R. 300, Finding No. 7). Much of appellee's claim involved this first shipment but the evidence showed, and the trial court found, that the parties entered into a settlement concerning this shipment (R. 300, Finding No. 8). The initial shipment is therefore not involved in this appeal, but the position in which appellee placed itself by its own conduct in failing to get immediate approval or rejection and in violating the stop order is significant.

After the settlement on the first shipment, 1300 sheets of plywood were required to complete the job (R. 300, Finding No. 8). These were supplied by appellant in subsequent shipments. *While portions of some subsequent shipments did not meet specifications, conversely each shipment contained usable sheets* (R. 301-302, Finding No. 41). *Faulty portions were in each instance replaced by the appellant. The evidence showed and the trial court also specifically found that there were sufficient good sheets in each subsequent shipment to keep ahead of the appellee's requirements as construction progressed and no delay could therefore be attributed to lack of suitable siding on the jobsite.* (R. 302-303, Finding No. 17).

With further findings that the project had been plagued by problems and delays caused by numerous other subcontractors, labor disputes, record weather extremes, a multitude of contract changes and numerous other causes in no way related to the siding (R. 306-308, Findings No. 28-29), and it appearing that the project was actually

on schedule up to the point where all siding was completed (R. 308-309, Finding No. 31), the trial court rejected the huge claims (prayer of complaint—$400,000.00, R. 2) of the appellee (R. 311, Finding No. 38).

This should have been the end of it.

But the court awarded $26,000.00 damages on its own complex formula—on a theory never advanced by appellee (R. 309-310, Findings No. 32-35). In order to understand the basis of the court's award and the faultiness of the court's reasoning in so doing, the following must be understood:

(a) The siding was ordered and supplied in standard 4' x 8' sheets. The eight buildings involved were of simple two-story construction, all of the same basic design (Exhibit H, Building Plans), and siding was to be applied in three rows or tiers with a minimum of cutting and piecing (Tr. 303-304). The upper row or tier covered the second story walls and took a full eight foot sheet. The middle tier or row covered the first floor walls and was also a full eight foot sheet. The third or lower tier covered the basement or foundation above ground and was approximately five feet high (Tr. 304).

(b) The trial court based its damage award on the premise that the appellee had to change its planned method of applying siding to the second floor walls on those four or five buildings which were completed with the 1300 sheets of the second and subsequent shipments (R. 309, Finding No. 22). Appellee alleged it originally intended to apply the siding to the second floor wall framing while it was lying flat on the second floor deck and

then tilt up or raise the framing and siding with hydraulic jacks. It further alleged it had to alter this plan, and while still raising the framing with jacks, it thereafter applied the siding to the erect second story walls, using men on scaffolding. In any event, this tilt-up method of siding application involved only the second floor siding or one-third of the siding on these buildings (Tr. 305). The remaining two-thirds of the siding to go on the first floor and basement walls was to be installed in exactly the same way under either method.

(c) The only comparison between cost of the two alleged methods of applying this second story siding was a speculative opinion of appellee's superintendent that the latter cost three times as much as the former (Tr. 247-248).

(d) There was no evidence offered as to the time (man hours) or cost of either method allegedly used to *apply* siding, hence nothing to which this cost comparison could be applied. The only evidence even remotely related was an estimate of the time required to *remove and reapply* a sheet of siding on a previously sided building. This was an estimate of *three man hours* per sheet to so *remove and replace* (Tr. 331-333).

Keeping the foregoing in mind, examine the damage award of the trial court as set forth in Findings of Fact No. 32 through 35 (R. 309-310).

> "32. Plaintiff's plan of work provided that the plywood on the *second story* be applied to the framing while it was lying on the deck in a horizontal position. Thereafter the wall sections were to be raised

to a vertical position by the use of hydraulic jacks. This technique accelerated construction and was an economical method of erecting the *second floor framing and siding*. Buildings 846, 847 and 848 were constructed in this manner. By reason of the fact that the plywood siding supplied by defendant did not meet contract specifications, it became necessary for plaintiff to revise its plan of work by erecting the framing and thereafter applying the plywood siding by craftsmen working from scaffolding. *As a result of this change in the plan of work the cost of applying a sheet of plywood siding was increased about three times.*

"33. There remained, at the time of this change of plans, approximately 1300 *sheets of plywood siding* to be applied. *It required approximately 3 man hours per sheet to apply a sheet of plywood siding* to the end of a building. This is the best comparison appearing in the record for placing siding on the side of a building. The cost to plaintiff to keep a workman on the job was approximately $10.00 per hour.

"34. The court finds that the *cost of applying the remaining* 1300 *sheets of plywood siding under the revised work plan* was approximately and reasonably $39,000.00, computed as follows:

"$10.00 per man hour per workman.

"3 man hours—$30.00 per sheet.

"1300 sheets x $30.00—$39,000.00.

"35. Plaintiff's overall increased cost resulting from this revision in plans was approximately and reasonably two-thirds of $39,000.00 or $26,000.00."

NOTICE WHAT THE TRIAL COURT HAS DONE HERE—IT HAS TREATED ALL 1300 SHEETS AS SECOND FLOOR SIDING, whereas only ONE-THIRD of the 1300 sheets, or a maximum of 433 sheets could

be affected by a change in method of applying second floor siding. The remaining two-thirds were required to cover the first floor and basement walls. Also, if it takes at most three hours to *remove and replace* a sheet of siding, no more than half that time could be justified for *applying only*. Hence the trial court's formula for cost should not exceed:

$10.00 per man hour per workman.
1.5 man hours—$15.00 per sheet.
433 sheets x $15.00—$6,500.00.

Apportioning two-thirds of this cost to damages results in a maximum award of $4,333.00—not $26,000.00.

Actually, however, it had already been clearly established that appellee was not forced by siding considerations to alter its method of application. Adequate siding was always available at the job to be applied by appellee in any method it saw fit (R. 303, Finding 17).

ASSIGNMENTS OF ERROR

Appellant contends the District Court erred in the following respects:

1. The court erred in its Finding of Fact No. 32 wherein it held that (a) appellee revised its plan of erecting the second story walls "by reason of the fact that the plywood . . . did not meet specifications" and (b) that as a result of this change the cost of applying a sheet of siding was increased about *three times*.

2. Error is further assigned to Finding of Fact No. 33

wherein the court held that "It required approximately three man hours per sheet to *apply* a sheet of plywood siding. . . ."

3. Error is assigned to Finding of Fact No. 34 wherein the court found a total cost of placing 1300 sheets of plywood to be 3 man hours per sheet x $10.00 per man hour x 1300 sheets, or a total of $39,000.00.

4. Error is assigned to Finding of Fact No. 35 wherein the factor of "three times" described in Finding of Fact No. 32 (Assignment of Error 1 above) is used to impose two-thirds of the $39,000.00 cost figure on appellant, thereby finding appellee damaged in the sum of $26,000.00.

5. Error is assigned to Conclusion of Law No. 4 where appellee is found to be the *prevailing party* and entitled to attorneys' fees.

6. Error is assigned in the award of costs to appellee, because the only purported cost bill filed within the time allowed by the court rules, asking for the sum of $12,870.04, was not a compliance with court rules and should have been stricken as frivolous.

ARGUMENT FOR THE APPELLANT

1. Summary of Argument:

The following basic points will be established in this argument:

A. No revision of the erection plan of appellee could have been the fault of appellant, because the evidence

showed and the court affirmatively found that there was always adequate, suitable siding on the site available to appellee. Therefore, no damages can be awarded against the supplier.

B. The figure of $39,000.00 used as the cost of installation of siding, adopted by the court in Finding of Fact No. 32 was based upon pure speculation. At most, the added cost referred to second-floor siding only, not to just a third-floor siding. Hence this figure could refer only to one-third of the 1300 sheets the court mentions and the result must be accordingly reduced.

C. There is no evidence whatever in the record of the man hours needed to *apply* a sheet of plywood siding to support the finding of three hours per sheet used in Finding of Fact No. 33. The only evidence at all related was adduced by appellant in showing certain of appellee's back charges to be inflated and fraudulent, and this was that it took three hours to *remove and replace* a sheet of plywood. Therefore, no more than 1½ man hours per sheet could be considered for applying siding where price removed is not required. Therefore, the final figure must be further reduced.

2. General Observations:

The court is urged to remember that except for a couple of days in July, 1961, when Mr. Lewis, a representative of appellant visited the job site, appellant had no observer whatsover on this construction job and *all of the pertinent facts are within the peculiar knowledge of the ap-*

pellee. Time and again it is pointed out that the testimony of appellee's witnesses did not correspond to its more dependable records, e.g., its daily reports (Ex. 46). This prompted the trial court to make a specific finding resolving the conflicts in favor of the records (Finding No. 20, R. 304). The conflicts were mainly presented by Mr. Billimek, appellee's job superintendent (St. Supp. 33 and 37.38).

3. Sufficient Siding Available at All Times:

The trial court has carefully set out the evidence in Finding of Fact No. 9 through 17 showing how much good siding the appellee had on hand at all times, how much it needed for each building, and that appellee did not complete enclosure of buildings it obviously had ample siding to cover (Tr. 300-302). These findings show that while appellee had more than *enough siding for three buildings,* 846, 847 and 848 from the very beginning, it had *finished none* of them by the time the second shipment arrived on August 3rd. With the second shipment it had *enough to finish five buildings,* 846, 847, 848, 855 and 875, but by the arrival of the third shipment on August 23rd, it had *only completed one small building,* No. 848. With the third shipment, more than *enough siding was available to complete seven buildings,* all except one, and yet it was a full week thereafter before the *second* building was completed. The trial court concludes this complete analysis by finding:

> "The evidence does not establish what delay, if any, lack of suitable plywood may have caused plaintiff (appellee)." (Tr. 303)

Appellant had a duty to supply suitable siding. Appellee could not be damaged unless suitable siding was not supplied to fill its needs (regardless how much after the *contract* date the siding might have been delivered). The only reason appellant could be blamed for any change in siding application method would be because the siding was not there to use when needed. It is the appellee's burden of proving this element of its claim and it has signally failed to do so. While its oral testimony bemoans a constant lack of siding, appellee's reliable records of its construction progress (Ex. 46) prove the contrary (R. 303-304, Finding No. 20).

Bearing on the practicability of this tilt-up method it is important to consider that the wind at Ft. Greeley was vicious. A whole concrete block wall blew down on Bldg. 855 (Ex. 46, July 10, 1961). Building No. 875 was blown out of plumb on September 11, 1961 (Ex. 46). Added bracing of the buildings was required because of "the high winds at Greeley" lest they be blown down (Tr. 189). Repeated reference to high winds is found in the Daily Reports (Ex. 46). A framed wall without siding is much like an airplane wing without fabric on it. A framed wall with siding applied is like a completed wing. Although denied by appellee, it is submitted that tilting up a wall frame with the sail area of siding added, in this wind-swept area, would be foolhardy. It is recognized that this conclusion is supported only by the above inferences and not otherwise in the testimony. The logic of the position is so compelling that this writer could not omit it from this brief.

4. Comparison Figure of "Three Times" Is a Guess and Refers to Second Floor Siding Only

The siding affected by the tilt up method was the second floor siding only. This much of Finding of Fact No. 32 (R. 309) is correct. The second floor siding was only one-third of the siding on each building. Mr. Billimek, appellee's job superintendent, admitted:

"Q. Now on the construction of buildings, there are three basic tiers of siding, isn't that correct?

"A. Yes. One is only five feet.

"Q. The bottom is five feet, and the next two are full eight foot sheets?

"A. Yes." (Tr. 303-4)

* * *

"Q. At any rate, if you tilted up the upper story on both sides and the ends, if you did tilt up the ends, *you would have only a third of the siding on that building, would you, the number of sheets?*

"A. That's correct." (Tr. 305)

Mr. Billimek also admitted that the tilt-up procedure was used for wall frames *without siding*, and that he had used his special jacks for that purpose (Tr. 315).

The court obtained its cost comparison figure of "three times" from the following testimony, wherein appellee's counsel was questioning Mr. Billimek about a percentage of added cost due to siding delivery (Tr. 247-248):

"Q. The next question is, what is that opinion?

"A. The inefficiency in labor due to the job not being organized, and so the crew in the mornings when

they go to work didn't know what they were going to do. They just put their overalls on and worked instead of being told what to do — that would be roughly 20%.

Then as far as the siding being applied the way we had to, you know—if we could have applied the siding the way we had it planned, in order to have the walls laying down and applying the siding, the way we had to do it cost us about three times as much. Instead of $12.00 a square foot, it probably cost us close to $40.00 a square foot."

Note the court's doubts about this estimate of an opinion, i.e., speculation, at the time this testimony was received and its admission "for whatever it's worth" (Tr. 247).

The reference to $12.00 per square foot and $40.00 per square foot further shows that Mr. Billimek was merely pulling figures out of the air. At the lower rate, $12.00 per foot, it would have cost $821,000 to put on the original 1856 sheets which were 4 ft. x 8 ft., or 32 sq. ft. each. At the $40.00 rate, the figure would compute to $2,944,000.

THIS "THREE TIMES" FIGURE SHOULD HAVE BEEN TOTALLY REJECTED. IT IS NOWHERE SUPPORTED BY FACT OR EXPLANATION. But even in the court's use of it, it is submitted it was never intended to modify more than the siding affected by the loss of the tilt-up method, i.e., the one-third of the siding that covered the second floor walls. There of course were not 1300 second floor sheets that could have been affected by this alleged change in method. The court found that the appellee used this tilt-up process on the first three

buildings, Nos. 846, 847 and 848 (R. 309, Finding No. 32). These three buiildings had a total of 488 sheets on them when completed (R. 301, Finding No. 13 and R. 202, Finding No. 15). The remaining five buildings, Nos. 855, 875, 876, 877 and 821, including all three tiers from the ground up through the second floor, contained approximately 1300 sheets (a precise total from Finding No. 13, R. 301, indicates 1334 sheets).

Again, only second floor siding was to be applied to the "walls laying down" (Tr. 248). If this factor of "three times" was to be used at all it should have applied at most to the one-third of the 1300 sheets that went on the second floor walls of these five buildings.

5. There Is No Evidence of the Time to *Apply* a Sheet of Plywood Siding

The figure of *"Three man hours per sheet to apply a sheet of plywood"* as stated in Finding No. 33 (R. 309) is nowhere found in the evidence. There is no evidence from which it can be inferred. *There is a total failure of evidence to support this finding.*

The only statement conceivably related is found in cross-examination colloquy between Mr. Billimek and appellant's counsel while delving into a series of back charge claims being made by appellee, as set forth in Exhibit 45. These claims totalled some $45,000.00, nearly $40,000.00 of which is for some 4,360 man hours allegedly expended to "remove and replace defective siding"—*siding which the appellee was subsequently proved to have wrongfully put up in violation of the government rejec-*

tion and stop order.

It having been initially established by interrogatories and its own testimony that appellee could claim removal and replacement of at most 700 sheets (R. 75, St. 161) appellee's superintendent was queried on a reasonable time for removing and replacing a sheet. Some 4360 hours for this seemed high indeed. The following testimony was elicited (Tr. 331-333):

"Q. Mr. Billimek, getting back to what *might be a reasonable time for removing and replacing a sheet of siding,* let's assume you have a five man gang. One teamster, he can drive the truck and so forth, and the others are carpenters, and one is a foreman. *How many sheets of plywood could that group remove and replace in a day*?

"A. I could describe it better by wall area. I should say that group with that type of building should probably cover 20 or 25 feet down one side of the building.

"Q. 25 feet down one side of a building?

"A. 20 or 25 feet. It wouldn't be 25, it would be 24.

"Q. Well how many sheets during a 9 hour period, how many sheets could they *put up and remove*?

"A. Well, there are half sheets, and I don't know how many sheets it would take. You are talking about sheets. Maybe it would take a small piece that would have to be cut and fitted. It takes longer to put that on than a full sheet. I think they should cover that building between 20 and 25 feet down one side, either the side of the building or the back. The ends would be faster as there are no windows, but that's an average on the side of the building.

"Q. How long would it take to do one end of a building?

"A. They should complete one end, that crew that we mentioned awhile ago should complete one end in one day. Of course the ends are simple, they are all full sheets. And that's under good working conditions.

"Q. Pardon.

"A. That's under good working conditions.

"Q. That's 18 sheets on the ends, plus the other material, is that right?

"A. Yes.

"Q. So that four men in nine hours, maybe they could do—

"A. We were talking about five men, weren't we?

"Q. Let's add another one in there then. Let's say five, and that would be about 45 man hours and we should do at least 15 sheets. *That's about three man hours per sheet. That's a pretty healthy estimate, isn't it, Mr. Billimek?*

"A. Under certain conditions it's not bad.

"Q. How bad was it?

"A. It was pretty cold during September. We were still getting plywood in, you know. Just before the 1st of October.

"Q. How about the last two weeks of August? That's not bad weather, is it?

"A. August isn't too bad, no. I mean August is considered a good month up here."

This testimony showed that even with the appellee trying to charge the appellant for removing and replacing siding it put up in violation of the government order —only 2100 hours (700 sheets x 3 man hours per sheet) could be justified for that activity, not 4360 as appellee claimed in Exhibit 45. A further comparison with appel-

lee's daily reports (Ex. 46) proved these back charges to be largely fraudulent fabrications. There was no removal and replacing of any siding, on *any* building after September 5th (R. 304-305, Finding of Fact No. 22). Yet these bogus back charges described week after week of "removing and replacing defective siding" on through October 9, 1961 (Ex. 45).

When challenged to refute this evidence of fraud, appellee had to admit (Tr. Sup. 60-61):

> *"Next, what about the back charges? Well, we recognize, Your Honor, the problem inherent in supporting those back charges. We feel that the explanation is for them that they are improperly reflected, actually, as removing and replacing siding, and by an inarticulate description so indicated."*
>
> * * *
>
> *"We feel with respect to those they were not actually removing and replacing siding. . . ."*

A beautifully prepared "record" in minute detail—names, hours, rate, overtime, etc.—suddenly becomes "inarticulate" when found to describe events that never took place.

It is true that evidence is generally admitted for all purposes. It is conceivable that evidence which proves a party is making a fraudulent claim on one issue could be used to aid that same party in another issue. BUT IT IS ABSOLUTE ERROR FOR THE TRIAL COURT TO *CHANGE THE DEFINITION* OF THIS "THREE MAN HOURS PER SHEET" FROM THE TIME REQUIRED TO REMOVE AND REPLACE SIDING TO THE TIME

REQUIRED TO PLACE IT ONLY. Under these particular circumstances it seems especially unjust.

A most charitable inference in favor of appellee would be that the two processes of removal and re-application are equivalent and hence each would require 1½ man hours per sheet. On the other hand, appellee was in exclusive possession of all the facts, appellee had the burden of proof, appellee obviously spent time producing bogus records on man hours engaged in siding endeavor, but produced no evidence on this critical point. IT WOULD BE IN NO WAY UNJUST OR UNFAIR TO REFRAIN FROM STRAINING THIS EVIDENCE IN APPELLEE'S FAVOR AND TO HOLD THAT APPELLEE SIMPLY FAILED TO ESTABLISH ITS CLAIM *IN TOTO.*

6. Cost Bill of Appellee

In the manner that is typical of the style of appellee in making a claim, this cost bill for $12,835.38 (R. 327-328) for a seven-day trial is outrageous. One is tempted to review it with some levity now—but only after recovering from the shudder of what would have happened if prompt objection had not been made. Could this have resulted in a judgment for that sum?

Look at some of the items listed. "William G. Jones, $4,603.95"—what does this mean and why try to charge appellant for it? David Rose, part of a $699 motel bill, and $1700.00 for "services." This was claimed for the man who was indicted for fraud against the government, after an F.B.I. investigation, *on this very job,* when he tried

to pass one coat of paint as compliance with specifications (Tr. 40). He never took the stand.

The judgment was filed on November 4, 1966 (R. 326) and the original cost bill ten days later, on November 16th (R. 327, 328). The applicable court rules provide:

Rule 15. Costs.

> "(1) The party in whose favor . . . shall . . . serve . . . and file . . . *in no event later than ten* (10) *days after notice of the entry of the decree or judgment*) his bill of costs. . . .
>
> "(2) Such bill of costs shall distinctly set forth each item thereof so that the nature of the charge can readily be understood. . . .
>
> "(3) . . .
>
> "(4) . . . The rate for witness fees, mileage and subsistence is fixed by Sec. 21.3 of Chapter 1, Title 28 of the Code of Federal Regulations."

CFR Sec. 21.3 provides for the following basic rates specifically for the District Courts of Alaska:

Witness attendance—$4.00 per day.

Subsistence if away from home—$15.00 per day.

Travel—cheapest first class rate if by common carrier.

The $12,835.38 claim is not minimal compliance with the above rules. It should be treated as a nullity. Subsequent attempts to amend it, pare it down, occurring after the ten days for filing thereof should not be permitted to cure ts basic defects. The objections made by appellant's counsel (R. 343-345) should have been granted and the cost bill stricken as frivilous.

8. Applicable Legal Principles

The Trial Memorandum of appellant (R. 129-136) and the appellant's Memorandum in Support of Conclusions of Law (R. 279-287) sets forth the law applicable to this situation. Only short excerpts will be repeated here reaffirming the basic legal principles which apply.

Appellee, as plaintiff, had the burden of proof of its claims. As stated in *U.S. v. Griffith, Gornall & Carman, Inc.*, 210 F. Supp. 11:

> "The fact of damage, however, must be proved to a certainty. Mathematical exactness as to the amount is not required but the evidence must form a basis for a reasonable approximation. *The court must have before it such facts and circumstances to enable it to make an estimate of the damage based upon judgment, not guesswork.*
>
> * * *
>
> "The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable."

The appellee knew from the time of arrival of the first shipment, in May, 1961, that it was in all probability defective, and kept this fact from the government inspectors until they began to apply the material. In so doing, all possible re-order time between May 29th and July 3rd was lost (Tr. 333, 334). They wrongfully continued applying the material when told to stop. This certainly violates the rule as announced in *Anchorage Independent School District v. Stevens*, 370 P.2d 531 (Alaska Supreme Court,

April 3, 1962), wherein it is stated:

> "It is a cardinal rule in the law of damages that a plaintiff, with an otherwise valid right of action, is denied recovery for so much of the losses as are shown to have resulted from failure on his part to use reasonable efforts to avoid or prevent them."

As also stated in *Razey v. J. B. Colt Co.*, 106 App. Div. 103, 106, 94 N.Y.S. 59:

> ". . . Where the plaintiff seeks to recover damages for a breach of general warranty, which are usually the difference between the value of the thing as it is in fact and as it was warranted to be, the question of negligence does not enter; but, where he seeks to recover consequential damages he should not be permitted to recover for his own negligence. It has frequently been said that such damages are recoverable as may reasonably be said to have been within the contemplation of the parties. Warranty is not insurance, and there is nothing in this contract to indicate that either party supposed the defendant was to answer for the plaintiff's carelessness."

CONCLUSIONS

There was always adequate siding on the job commensurate with appellee's construction progress. This means appellee had the choice to use any method of siding erection it desired. Appellee indicates it did not use the second story siding method it allegedly anticipated. It may have decided that prudence was a virtue, and after Building 855 blew down on July 10th it abandoned any thought of the tilt up method. No damages should have been awarded appellee for the alleged revision of method.

If the appellee merits any award, the following must be considered:

The record indicates that a figure of three hours was for *removal and replacement* of a sheet, not merely the *placement* of a sheet (St. 331-333). The witness giving this estimate admits this is a healthy estimate except under conditions of extreme cold, which did not prevail prior to the closing in of the buildings. It is submitted that the time for placement of a sheet, as opposed to three houses for the removal and replacement, could not exceed one and one-half hours, giving plaintiffs all benefit of inference. It would follow from this element alone that the $26,000.00 item of damages in Finding No. 33 should initially be reduced to $13,000.

Furthermore, it appears in the record that Mr. Billimek (at St. 248) was estimating a factor of three when talking about the upper tier of siding, the only tier that was to be applied to the frame while lying flat and then tilted up (St. 305). The other two tiers, being that covering the first floor walls and the short tier covering the basement above ground (St. 303-304) were in fact applied in the manner originally intended. Thus, since only one-third of the remaining 1300 sheets took additional time to install, the factor should be applied only to 433 sheets and the $13,000.00 award further reduced to $4,333.00.

The trial court had this case under advisement for some 14 months before it rendered its decision. After some four months the court indicated its disposition to make an award for appellee but indicated serious difficulties with

finding an amount.

Ten months later, the trial court made its award which was large enough to make appellee the "prevailing party." Appellee's entire argument on May 26, 1966 is in the Transcript (Tr. Supp. 1-39, 56-65) and no mention of this award formula is even suggested. The same is true of appellee's description of its damage given in answers to interrogatories (R. 81-83, 111-115).

This record presents *no* legally sufficient reasons for awarding tens of thousands of dollars to this non-damaged party. The judgment should be reversed with the deletion of the damage award, costs and attorneys' fees in favor of appellee. The cross-claim award in favor of appellant for which there is no contest should be affirmed.

Respectfully submitted,

Casey & Pruzan
By John F. Kovarik
Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN F. KOVARIK
Of Attorneys for Appellant

APPENDIX OF EXHIBITS

Only three of the Exhibits were made a part of the record:

Exhibit No.	*Description of Exhibit*	*Offered*	*Admitted*
Plaintiff's 1-E	Schedule Submitted to Government	Tr. 249	Tr. 249
Plaintiff's 1-F	Billimek Schedule	Tr. 108	Tr. 108
Defendant's G	Schedule Approved by Government	Tr. 250	Tr. 251

Because of their size, Exhibit 45, Back Charges, and Exhibit 46, Daily Reports, were not made a part of the record on the recommendation of the Clerk of Court who suggested they be reviewed by the court in their original form with reproduction.

No. 21532

IN THE

United States Court of Appeals For the Ninth Circuit

MAUK SEATTLE LUMBER CO.,
Appellant,

v.

ALCAN PACIFIC CO.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

BRIEF OF APPELLANT

CASEY & PRUZAN
Attorneys for Appellant

Office and Post Office Address:
30th Floor, Smith Tower
Seattle, Washington 98104

METROPOLITAN PRESS SEATTLE, WASH.

SUBJECT INDEX

TABLE OF AUTHORITIES

Table of Cases

Statutes

Other Authorities

IN THE

United States Court of Appeals For the Ninth Circuit

MAUK SEATTLE LUMBER CO.,
Appellant,

v.

ALCAN PACIFIC CO.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a money judgment in favor of plaintiff-appellee, entered by the District Court sitting without a jury. The court's jurisdiction was based upon diversity of citizenship under 28 U.S.C. 1332, appellee being an Alaska corporation and appellant being a Washington corporation. The jurisdictional facts are pleaded in Par. 1 of the Complaint (R. 1), admitted in Par. I of the Answer (R. 50), and found by the court in Par. I of the Findings of Fact (R. 298).

Jurisdiction of the Court of Appeals is based upon 28 U.S.C. 1291.

Judgment for appellee was entered November 4, 1966 (R. 326). Notice of Appeal was given by appellant on November 28, 1966 (R. 335).

STATEMENT OF THE CASE

Appellee sued appellant for $400,000 damages for claimed faulty delivery of a little more than $6,000 of plywood to be used on appellee's $2,000,000 housing construction contract.

Appellee, Alcan Pacific Co. (hereinafter referred to as "Contractor"), entered into a $2,000,000.00 contract with the United States to construct military housing at Ft. Greeley, Alaska.

Appellant, Mauk Seattle Lumber Co. (hereinafter referred to as "Supplier"), subcontracted with the Contractor to supply on the jobsite 1860 pieces of Type II ⅜-inch plywood siding at a price of $6,249.60.

The Contractor sued the Supplier for $400,000.00 for breach of this subcontract, allegedly arising out of the Supplier's failure to timely furnish acceptable plywood siding at the jobsite.

The trial court awarded damages of $26,000.00 (from which this appeal is being taken), and an additional $1,-117.28 for incidental items (which is not being appealed from).

The facts are as follows:

The full 1860 pieces of siding were delivered to the job-site by the Supplier. The Contractor's Superintendent examined the shipment, found it to look "very bad," but nevertheless commenced to have it applied without ob-

taining a decision on the material from the Government Resident Engineer (Tr. 333). The Government promptly rejected the siding, and issued a formal stop order. The stop order was ignored, and the Contractor continued to apply the siding (R. 300, Finding No. 7).

Much of the trial involved the Contractor's claim for damages arising from this initial shipment. However, the evidence showed, and the trial court found, that the parties had entered into a complete settlement concerning this shipment (R. 300, Finding No. 8). The settlement included the Supplier giving the Contractor a credit of $2,000.00 to cover the application and removal of the below-grade siding and for reloading and sorting the remaining siding. In addition, Supplier agreed to replace 1300 pieces of siding which did not meet specifications (R. 300, Finding No. 8).

These 1300 pieces were furnished by the Supplier in subsequent shipments. Portions of subsequent shipments did not meet specifications, and, conversely, each shipment contained usable sheets (R. 301-2, Finding No. 14).

Thus, notwithstanding that some of the plywood was faulty, *there were always enough usable sheets to keep ahead of the Contractor's requirements as construction progressed. This was specifically found by the court in Findings* Nos. 13, 14, 15, 16 and 17 (R. 9, 10, 11).

Not only did the trial court find that there was always sufficient good plywood on hand to meet the Contractor's requirements, as above stated, but in answer to the Contractor's claim that it was delayed by lack of adequate

plywood, the court entered Finding 17 (R. 11) which states:

> *The evidence does not establish what delay, if any, lack of available suitable plywood may have caused plaintiff.*

The court affirmatively found that all delays in construction resulted from causes other than the plywood delivery schedule. We quote Findings of Fact 28 and 29 (R. 306-308):

> 28. *From the beginning plaintiff's project was plagued by problems and delay caused by the excavation subcontractor, the catering subcontractor, the painting subcontractor, mechanical subcontractor, flooring subcontractor, material problems, and lack of detail information.* THESE DELAYS WERE IN NO WAY RELATED TO THE PLYWOOD SIDING.
>
> 29. The progress of the work on Contract 1544 was subjected to other delays resulting from the following:
>
> a. Changes, omissions and mistakes in the plans and specifications, and additional work ordered by the Government.
>
> b. A labor dispute. . . .
>
> c. A record breaking rainfall during the year 1961 and a record cold breaking spell during that winter.
>
> d. Numerous other delays. . . .
>
> e. The combination of the changes, additional work and delays seriously changed the conditions of plaintiff's contract with the Government and the labor dispute and strike caused a major delay in the construction schedule.

Notwithstanding the fact that there was always enough suitable plywood on hand to meet the Contractor's requirements, and that the delays were caused solely by

the multitude of other causes, the Contractor instituted the within action against the Supplier, *claiming that it was damaged to the extent of* $400,000.00 (!) *by reason of portions of shipments of the* 1300 *pieces* (*worth some* $4,300) *not meeting specifications.*

The Contractor produced elaborate records which purported to "record" in minute detail the names, hours, rate, overtime, etc. of men who allegedly worked to remove and replace defective siding.

The evidence showed the "records" to be largely fraudulent fabrications. For example, there was no removal and replacing of any siding on any building after September 5th (R. 304-305, Finding No. 22). Yet these bogus records showed backcharges for week after week of "removing and replacing defective siding" on through October 9, 1961 (Ex. 45).

When challenged to refute this evidence of fraud, the Contractor's counsel stated (Tr. Sup. 60-61):

> Next, what about the back charges? Well, we recognize, Your Honor, the problem inherent in supporting these back charges. We feel that the explanation is for them that they are improperly reflected, actually, as removing and replacing siding, and by an inarticulate description so indicated.
>
> . . .
>
> We feel with respect to those they were not actually removing and replacing siding . . .

A painstakingly fabricated record prepared in minute detail, becomes "inarticulate" when found to describe events that never took place!

The trial court rejected these claims (R. 311, Finding No. 38).

Let us now turn to what the trial court should have done, and what it actually did.

What the trial court should have done:

As shown, the court found (a) that the Supplier at all times furnished sufficient good siding on hand at the job-site to keep ahead of the Contractor's requirements, (b) that no delay was caused by the fact that portions of shipments contained faulty siding, (c) that the Supplier replaced all faulty siding with good siding, and (d) that the parties had reached a settlement concerning the initial siding which the Contractor had applied in violation of the stop order and later had to remove and replace.

Under such circumstances, the only possible damage which the Contractor could claim would be those directly resulting from the necessity to sort out and replace some of the plywood.

The Contractor did claim such damages, the court allowed them, and the Supplier is not objecting to nor appealing from this portion of the award, itemized in Finding No. 36 (R. 310) as follows:

Plane ticket for William G. Jones	$ 65.00
Telephone call to George Hannaford in Hoquiam	5.78
Freight on second shipment	922.06
Handling second shipment of plywood for grader	123.44
	$1,117.28

This should have been the end of it, and the court should have made no further award to the Contractor.

What the trial court did:

The court awarded the Contractor $26,000.00 damages (in addition to the $1,117.28), on its own complex for-

mula — on a theory never advanced by the Contractor (R. 309-310, Findings No. 32-35).

In order to understand the basis and the error of the court's award, the following additional facts must be supplied.

Eight buildings were being constructed, all of the same simple, two-story design (Ex. H). The siding came in 4-foot by 8-foot sheets. Three horizontal rows of siding were to be applied to the outside of each building: the upper row covered the second floor; the middle row covered the first floor; the lower row covered the basement or foundation above ground.

The trial court based its damage award on the premise that the Contractor had to change its planned method of applying siding to the second floor walls on those four or five buildings which were completed with the 1300 sheets of second and subsequent shipments (R. 309, Finding No. 22).

This change allegedly consisted of the following:

That the contractor originally intended to apply the siding to the second floor wall framing while the framing was still lying flat, and then tilt up the framing and the attached siding with hydraulic jacks, and affix it to the building. That instead, the contractor first tilted the framing up, and thereafter applied the siding to the erect second story walls. This allegedly cost more because it required men on scaffolding to apply the second floor siding to the erect second story wall, whereas under the original plan the second floor siding could have been applied while still lying flat (R. 309, Finding No. 32).

This tilt-up method of siding application involved only the second floor siding, or one-third of the total siding on these buildings (Tr. 305). The remaining two-thirds of the siding which was applied to the basement and first floor walls was to be installed in exactly the same way under either method.

Based upon this alleged additional cost of applying the second floor siding after the framing was affixed to the building, rather than being able to apply it while the framing was still lying horizontally, the court awarded damages of $26,000.00.

The trial court's error was two-fold:

(1) The alleged change of method in applying the siding was not caused by any act of the Supplier.

(2) Even if the change of method had been caused by act of the Supplier:

a. There was no evidence of the amount of damage caused by such change, and

b. The formula used by the court was erroneous.

This will be fully demonstrated in the "Assignments of Error" and "Argument for Appellant" sections of this brief.

ASSIGNMENTS OF ERROR

Assignment No. 1

The court erred in entering that portion of Finding of Fact No. 32 (R. 309) which finds that the Contractor revised its plan of erecting the second story walls "by reason of the fact that the plywood . . . did not meet specifications." The court similarly erred in entering Conclusion of Law No. 2 (R. 311).

The error is that there is no evidence in that record to support such finding, and therefore no basis for the Conclusion of Law.

Assignment No. 2

The court erred in entering that portion of Finding of Fact No. 34 (R. 310) which finds that the Contractor had to apply 1300 sheets of plywood by the revised method because of the change in plans.

The error is that the alleged change of plans only affected one-third of the 1300 sheets, namely, the one-third of them applied to the second floor. There is no claim that it affected the cost of applying the remaining two-thirds of the siding applied to the basement and first floors. This is solely mathematical error on the part of the court.

Assignment No. 3

The court erred in entering that portion of Findings of Fact Nos. 33 and 34 (R. 12-13) which found that "It required approximately 3 man hours per sheet to apply a sheet of plywood siding."

The error is that there is no evidence in the record to support the finding, and that the evidence is to the contrary.

Assignment No. 4

The court erred in entering that portion of Finding of Fact No. 32 (R. 12) which states:

> As a result of this change in the plan of work the cost of applying a sheet of plywood was increased about 3 times.

The error is that there is no evidence in the record to support the Finding.

Assignment No. 5

The court erred in entering Finding No. 35 (R. 310) that the Contractor's cost was increased "two-thirds of $39,000.00 or $26,000.00," and Conclusion of Law No. 2(a) (R. 311) to the same effect and the Judgment (R. 326).

The error is that this cumulates and summarizes the errors enumerated in Assignments of Error Nos. 2, 3 and 4.

Assignment No. 6

The court erred in entering Conclusion of Law No. 6 (R. 312) that:

> Plaintiff is the prevailing party and as such is entitled to recover its costs to be taxed by the Clerk and an attorney's fee in the sum of $2,500.00, which amount is hereby adjudged by the court to be reasonable.

and in entering judgment for costs (R. 326).

The error is two-fold:

(a) The Supplier recovered judgment on its cross-complaint in the sum of $10,641.76 (R. 326). This is so greatly in excess of the amount the Contractor is entitled to recover on its Complaint, that the Supplier is the prevailing party and should recover its costs.

(b) The Contractor's cost bill of $12,835.38 (of which only $2,666.16 was allowed), was a sham and did not constitute even minimal compliance with the rules. It should therefore be treated as a nullity.

ARGUMENT FOR THE APPELLANT

Re: Assignment of Error No. 1

This assigns as error the entry of a finding that the Contractor revised its plan of putting the siding on the second floor walls "by reason of the fact that the plywood did not meet specifications."

There is no evidence to support such finding.

The evidence is to the contrary, and the other Findings of Fact are to the contrary. As set forth earlier in this brief, the court affirmatively found that (a) the Supplier at all times furnished sufficient good siding on hand at the jobsite to keep ahead of the Contractor's requirement, (b) no delay was caused by the fact that portions of shipments contained faulty siding, and (c) the Supplier replaced all faulty siding with good siding.

There can be no possible basis for finding that the Contractor had to change its plan because of the Supplier, and no basis for any damage award based thereon.

[The record contains the real reason why the Contractor changed its plan from applying the second floor plywood wall while the frame was lying down horizontally and then tilting it up, to putting up the bare frame and then applying the plywood covering.

The wind at Ft. Greeley was vicious. A whole concrete wall blew down on Bldg. 855 (Ex. 46, July 10, 1961). Building No. 875 was blown out of plumb on September 11, 1961 (Ex. 46). Added bracing of the buildings was required because of "the high winds at Greeley" lest they be blown down (Tr. 189). Repeated reference to high winds is found in the Daily Reports (Ex. 46). A

framed wall without siding is much like a kite without paper on it. The wind can blow through it. A framed wall with siding applied is like a completed kite. Tilting that up with the plywood already applied in the face of vicious winds would be foolhardy. We recognize that the Contractor denies this as the reason, and that this conclusion is supported only by inferences from the evidence, but the logic of this position is compelling.]

Re: Assignment of Error No. 2

This assigns as error the court's findings that all 1300 sheets of plywood had to be affixed the revised way because of alleged fault of the Supplier.

As previously set forth, the entire remaining job involved only 1300 sheets of plywood. One-third was applied to the basement or foundation level, one-third was applied to the first floor walls, and one-third was applied to the second floor walls (Exhibit H; Tr. 303-304).

It was only the method of applying siding to the second floor that the Contractor claimed had to be changed. The method of applying siding to *the remaining first floor and basement walls was not affected* (Tr. 305).

It is readily apparent that the court made a pure mathematical error. Even if it were proper to award damages, only one-third of the 1300 plywood sheets are affected by the alleged changes of plans. This amounts to 433 sheets, instead of the full 1300 sheets. *Thus, to start with, the court's award must be reduced by two-thirds.*

Re: Assignment of Error No. 3

This assigns as error the court's Findings Nos. 33 and 34 that "It required approximately 3 man hours per sheet to apply a sheet of plywood siding."

The Contractor presented no evidence whatever as to how long it would take a man to apply a sheet of plywood siding. There is no evidence from which such fact could even be inferred.

Then where did the trial court get the impression that there was any such evidence?

The answer is this:

It will be recalled that on the initial faulty shipment, the Contractor applied some of the siding despite the Government's stop order. Notwithstanding that the Supplier and the Contractor entered into a settlement concerning this initial shipment, the Contractor sued for huge alleged damages arising out of the initial shipment. The court found that a full settlement had indeed been made, and allowed the Contractor nothing further regarding the first shipment (R. 300, Finding No. 8).

During cross-examination of the Contractor's Superintendent concerning this huge invalid claim, the Supplier's counsel was questioning as to how long it might take *TO REMOVE AND REPLACE* a sheet of siding—*not how long it would take only to apply a sheet of siding.*

This cross-examination was as follows (Tr. 331-333):

Q. Mr. Billimek, getting back to what *might be a reasonable time for removing and replacing a sheet of siding,* let's assume you have a five man gang. One teamster, he can drive the truck and so forth, and the others are carpenters, and one is a foreman.

How many sheets of plywood could that group remove and replace in a day?

A. I could describe it better by wall area. I should say that group with that type of building should probably cover 20 or 25 feet down one side of the building.

Q. 25 feet down one side of a building?

A. 20 or 25 feet. It wouldn't be 25, it would be 24.

Q. Well how many sheets during a 9 hour period, how many sheets could they *put up and remove?*

A. Well, there are half sheets, and I don't know how many sheets it would take. You are talking about sheets. Maybe it would take a small piece that would have to be cut and fitted. It takes longer to put that on than a full sheet. I think they should cover that building between 20 and 25 feet down one side, either the side of the building or the back. The ends would be faster as there are no windows, but that's an average on the side of the building.

Q. How long would it take to do one end of a building?

A. They should complete one end, that crew that we mentioned awhile ago should complete one end in one day. Of course the ends are simple, they are all full sheets. And that's under good working conditions.

Q. Pardon.

A. That's under good working conditions.

Q. That's 18 sheets on the ends, plus the other material, is that right?

A. Yes.

Q. So that four men in nine hours, maybe they could do—

A. We were talking about five men, weren't we?

Q. Let's add another one in there then. Let's say five, and that would be about 45 man hours and we

should do at least 15 sheets. *That's about three man hours per sheet. That's a pretty healthy estimate, isn't it, Mr. Billimek?*

A. Under certain conditions it's not bad.

Q. How bad was it?

A. It was pretty cold during September. We were still getting plywood in, you know. Just before the 1st of October.

Q. How about the last two weeks of August? That's not bad weather, is it?

A. August isn't too bad, no. I mean August is considered a good month up here.

This cross-examination amounted to this: The Contractor's Superintendent was forced to agree with counsel that *three man hours per sheet to remove and replace a sheet of plywood* would be a pretty healthy estimate.

The trial court erroneously assumed that this estimate of three man hours per sheet applied to putting up a sheet of plywood, whereas it is clear that it applied to the total time necessary to remove a sheet already affixed, and then put up a new one.

There is no other evidence or inference from evidence on this point in the record.

A most generous inference in favor of the Contractor would be that the two processes of removal of the old and application of the new each would take an equal amount of time, which would be one and one-half man hours for each operation. But common sense would dictate that it must take much longer to remove an already affixed sheet of plywood than to simply nail up a new one.

The Contractor was in exclusive possession of all the facts, and had the burden of proof. The Contractor

spent long hours producing doctored reports on how long it took to remove and replace siding *but he produced no records whatsoever and no evidence whatsoever to show how long it takes to put on a sheet of plywood.*

Re: Assignments of Error Nos. 4 and 5

In the findings involved in the last two Assignments of Error, the court was concerned with how much it cost the Contractor to put up the second floor siding by the revised method.

From any such amount, of course, must be deducted the amount it would have cost to put up the second floor siding under the originally planned method, in order to determine damages.

Finding of Fact 32 (R. 12) purports to give the answer:

> As the result of this change in the plan of work the cost of applying a sheet of plywood siding was increased about 3 times.

The court obtained its cost comparison figure of "three times" solely and exclusively from one question and answer occurring when the Supplier's counsel was cross-examining the Contractor's Superintendent *about an opinion, not about a fact* (Tr. 247-8).

Q. The next question is, what is that opinion?

A. The inefficiency in labor due to the job not being organized, and so the crew in the mornings when they go to work didn't know what they were going to do. They just put their overalls on and worked instead of being told what to do—that would be roughly 20 per cent. Then as far as the siding being applied the way we had to, you know—if we could have applied the siding the way we had it planned, in order to have the walls lying down and

> applying the siding, the way we had to do it cost us about three times as much. Instead of $12.00 a square foot, it probably cost us close to $40.00 a square foot.

Note the indefiniteness of the answer: "*about* three times as much," "it *probably* cost us *close* to $40.00 a square foot."

Note also the court's doubts about this speculative estimate at the time the testimony was received, and that the court admitted it "*for whatever it's worth*" (Tr. 247).

Note also that this occurred on cross-examination, and that *the Contractor did not introduce one iota of evidence as to what it would have cost to apply the siding under the original method.*

NOTE ESPECIALLY WHAT THE CONTRACTOR'S SUPERINTENDENT HAS REALLY SAID:

Each piece of plywood is 4 feet by 8 feet, which is 32 square feet. The Superintendent here says it would cost $40 a square foot to put up the plywood. *If this were true, it would cost* $40 *x* 32 *sq. ft., or* $1,280.00 *to put up just one piece of* $3.50 *plywood under the revised method!*

The trial court had already found in Findings Nos. 32 and 34 (R. 309-310) that it took three man hours at $10 per hour, or $30 to put up a piece of plywood under the revised method. In the above quoted cross-examination, the Superintendent is saying it costs $1,280.00—rather than $30.00—to put up a piece of plywood under the new method, and that it might only cost one-third as much under the originally planned method.

What did the trial court do with this conflicting testimony?

It did two things: (1) From the testimony that it took three man hours to remove and replace a sheet, the court concluded that it took three man hours just to apply a sheet. And from the later testimony that it cost $1,280 to put up a sheet the new way and maybe only one-third as much the old way, the court concluded that the new method cost three times as much as the old method. And then it threw these two elements in together in arriving at its formula.

Certainly, this cannot be an acceptable standard of proving damages by the one who has the burden of proof. It falls far short of the correct standard, set forth in *U.S. v. Griffith, Cornall & Carman, Inc.*, 210 F. Supp. 11:

> The fact of damage, however, must be proven to a certainty. Mathematical exactness as to the amount is not required, but the evidence must form a basis for reasonable approximation. *The court must have before it such facts and circumstances as to enable it to make an estimate of the damage based upon judgment, not guesswork.*
>
> . . .
>
> *The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable.*

As shown, the court was entirely in error in computing how much it cost to apply plywood under the revised method. But even if it had been correct, that still doesn't solve the problem. It doesn't solve the problem because after one computes the cost under the new method, one must subtract how much it would have cost under the

old method, before damages of the difference can be arrived at. The Contractor totally failed to present any evidence of what his cost would have been under the old method. Therefore, under any circumstances, there is no basis in the record on which to compute any damage.

The "three times" guess is nowhere supported by fact or explanation. It should have been totally rejected. But in any event that was never intended to modify more than the one-third of the siding applied to the upper floor affected by the alleged change of method.

The foregoing is the basis of the court's Finding No. 35 (R. 310) (our Assignment of Error No. 5) that "Plaintiff's overall increased cost resulting from this revision in plans was approximately and reasonably two-thirds of $39,000 or $26,000.00." The court is here saying that if the revised method cost $39,000 and the method originally planned would have cost one-third of that, the damage is the difference, $26,000.00.

Summary on Assignments of Error 1 Through 5

We wish here to summarize the three steps the court went through in order to arrive at its award. But first, it should be noted that the trial court had great difficulty in arriving at any award.

The case was held under advisement for some 14 months before a decision was rendered.

After some four months the court indicated its disposition to make an award to the Contractor, but indicated serious difficulties with finding an amount.

Ten months thereafter, the court made its award, which

was large enough to make the Contractor the "prevailing party."

The Contractor's entire argument on May 26, 1966 is in the Transcript (Tr. Supp. 1-39, 56-65), and no mention of this award formula is even suggested. The same is true of the Contractor's description of its damage given in answers to interrogatories (R. 81-83, 111-115).

No award in any amount could properly be made to the Contractor. When the evidence showed and the court found that the Supplier always had sufficient good plywood on the jobsite to meet the Contractor's requirements, and that the delays resulted from many other causes, that should have been the end of it, because the Supplier's delivery schedule could not have been the cause of the Contractor's change of method of construction.

Nevertheless, the court awarded $26,000.00 in damages, stated in Findings 34 and 35 as follows:

> $10.00 per man hour per workman.
> 3 man hours equals $30.00 per sheet
> 1300 sheets times $30.00 equals $39,000.00
> two-thirds of $39,000.00 equals $26,000.00.

We have shown that the "3 man hours" was merely speculative evidence on how long it would take to remove a defective sheet and affix a new one, so that at most only one and one-half man hours could be taken as the time to affix a sheet only.

We have further shown that the "1300 sheets" should have been only one-third as much, or 433 sheets, inasmuch as only one-third of the 1300 sheets affixed to the second story are involved in the alleged change.

Thus, even on the court's own formula, the award could not exceed the following:

$10.00 per man hour per workman.
one and one-half man hours equals $15.00 per sheet
433 sheets times $15.00 equals $6,495.00
two-thirds of $6,495.00 equals $4,333.33.

Re: Assignment of Error No. 6

This assigns error to the Contractor having been found to be the "prevailing party," and to the allowance of costs and attorney's fees to the Contractor.

The court here was doubly in error:

1. The Supplier cross-complained against the Contractor asking for judgment in the sum of $10,641.76. The cross-complaint was allowed, and the Supplier was granted judgment against the Contractor in the sum of $10,641.76 (to be deducted from the judgment awarded the Contractor) (R. 312). This is greatly in excess of the amount the Contractor is entitled to recover. The Supplier is therefore "the prevailing pary" rather than the Contractor.

2. The Contractor's cost bill of $12,835.38 (of which only $2,666.16 was allowed), was a sham and did not constitute even minimal compliance with the rules. It should therefore be treated as a nullity.

The Contractor's $12,835.38 cost bill (R. 327-8) for a seven day trial was just as outrageous as the prayer in its Compaint seeking $400,000.00 in damages (R. 2).

One need only to look at some of the items listed.

"William G. Jones, $4,603.95"—"David Rose," part of a $699 motel bill and $1,700.00 for "services." This was claimed for the man who was indicted for fraud against

the Government, after an F.B.I. investigation *on this very job,* when he tried to pass off one coat of paint as compliance with specifications (Tr. 40). *He never even took the stand in our case.*

Applicable Court Rule 15 on "Costs" provides:

> (1) The party in whose favor . . . shall . . . serve . . . and file . . . *in no event later than ten* (10) *days after notice of the entry of the decree or judgment his bill of costs . . .*
>
> (2) *Such bill of costs shall distinctly set forth each item thereof so that the nature of the charge can readily be understood . . .*
>
> . . .
>
> (4) . . . The rate for witness fees, mileage and subsistence is fixed by Sec. 21.3 of Chapter 1, Title 28 of the Code of Federal Regulations.

The Code of Federal Regulations Sec. 21.3 provides for the following basic rates specifically for the District Courts of Alaska:

> Witness attendance—$4.00 per day.
> Subsistence if away from home—$15.00 per day.
> Travel—cheapest first class rate if by common carrier.

The $12,835.35 *claim is not minimal compliance with the above rules, and could not have been filed in good faith. It should be treated as a nullity, in that within ten days of the judgment a good faith cost bill was not filed "distinctly setting forth each item thereof so that the nature of the charge can readily be understood."*

Subsequent attempts to amend it and pare it down, occurring after the ten days for filing it, should not be permitted to cure its basic defects. The objections made by appellant's counsel (R. 343-5) should have been granted and the cost bill stricken as frivolous.

CONCLUSION

1. The Contractor is not entitled to damages from the Supplier for additional cost arising out of change of method of construction, because the evidence shows and the court found that the Supplier always had an adequate amount of good plywood on hand so as not to cause any delay in the Contractor's schedule.

2. If damages are to be awarded the Contractor on this item, it cannot exceed $4,333.33, instead of the $26,000.00 as computed by the trial court.

3. The Supplier is not disputing the award of $1,117.28 to the Contractor for the miscellaneous incidental items listed in Finding No. 35 (R. 310).

4. Whatever judgment is awarded the Contractor should be offset against the $10,641.76 judgment which the trial court granted the Supplier against the Contractor.

5. The judgment in favor of the Contractor for costs and fees should be reversed (a) because the Contractor is not "the prevailing party," and (b) because a legitimate cost bill complying with the rules was not filed within the required ten days after entry of judgment.

Respectfully submitted,

Casey & Pruzan
By John F. Kovarik
Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN F. KOVARIK
Of Attorneys for Appellant

APPENDIX OF EXHIBITS

Only three of the Exhibits were made a part of the record:

Exhibit No.	*Description of Exhibit*	*Offered*	*Admitted*
Plaintiff's 1-E	Schedule Submitted to Government	Tr. 249	Tr. 249
Plaintiff's 1-F	Billimek Schedule	Tr. 108	Tr. 108
Defendant's G	Schedule Approved by Government	Tr. 250	Tr. 251

Because of their size, Exhibit 45, Back Charges, and Exhibit 46, Daily Reports, were not made a part of the record on the recommendation of the Clerk of Court who suggested they be reviewed by the court in their original form with reproduction.

No. 21532

In The United States Court of Appeals For the Ninth Circuit

MAUK SEATTLE LUMBER CO.,
Appellant,

v.

ALCAN PACIFIC CO.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

BRIEF OF APPELLEE

CHARLES E. COLE
Attorney for Appellee

218 Lavery Building
Fairbanks, Alaska 99701
Telephone: 452-1124

SUBJECT INDEX

TABLES OF AUTHORITY

Table of Cases

TABLES OF AUTHORITY (cont'd)

Statutes

Annotations & Textbooks

Other Authority

In The
United States Court of Appeals
For the Ninth Circuit

MAUK SEATTLE LUMBER CO.,
Appellant,

v.

ALCAN PACIFIC CO.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered on November 4, 1966, by the United States District Court for the District of Alaska, at Fairbanks. Notice of Appeal was filed on November 28, 1966.

The complaint alleged that the District Court had jurisdiction by virtue of 28 U.S.C.A. 1332 on the ground of diversity of citizenship and that the amount in controversy was in excess of $10,000. (R.1., Complaint, para I.) Plaintiff was alleged to be a corpo-

ration organized and existing under the laws of the State of Alaska and defendant was alleged to be a corporation organized under the laws of the State of Washington. The answer admitted the jurisdictional allegations. (R. 50, para I). The District Court found in accordance with the jurisdictional allegations of the complaint.

This Court has jurisdiction under 28 U.S.C.A. 1291 because it is an appeal from a final decision of a district court of the United States.

STATEMENT OF THE CASE

On April 12, 1961, appellee was awarded a contract by the Corps of Engineers to construct eight family quarters units at Ft. Greely, Alaska. The contract price was $1,964,503 (Ex. 1-A,-B, Finding No. 2). The contract completion date was January 8, 1962. (Ex. 1-C, — 1-D, p. SC-1.)

Several days later appellant accepted a purchase order to furnish appellee with the lumber requirements for the project. (Finding No. 3). Included in this order was 1,856 sheets of 4′ x 8′ Type II ⅜″ grooved siding. (Finding No. 4) Prior to acceptance of the purchase order, appellant's representatives were notified of the contract specifications for the plywood, (Finding No. 4), and that it was a critical item which appellee had to have immediately because the contract completion date required that the buildings be closed in before the cold weather set in. (T.

18-19) In addition to being necessary for closing in the buildings, the extra plywood was "the only structural strength. There was no bracing." (T. 117). At the time it accepted the order appellant knew of the shipping delays for transportation of building materials to Alaska and the seasonal construction schedule which prevailed there. (T. 405-406).

Appelle's general superintendent, Edgar J. Billimek, arrived on the job site about April 15, and undertook preliminary efforts in readying the construction work for performance. He had prepared a plan for prosecuting the work and construction schedules for subcontractors and the Corps of Engineers. (Finding Nos. 23 and 24. Ex. 1-F, G). The schedules were designed to have the buildings on the project closed in before the arrival of cold weather in the fall. Application of the exterior siding was to begin on June 1 with Building 846, 847, and 848 and be completed on all buildings by August 5. Completion of the last items of building construction was scheduled for October 31. (T. 109, 110, 457, 458).

The construction schedule and plan of work were developed in order to obtain maximum efficiency in the prosecution of the work. The work plan provided that the second floor siding would be applied while the second story walls were lying in a horizontal position so that the entire completed wall could be raised as an integral unit. (T. 113, 382, 384-386). This technique speeded up construction and was the most eco-

nomical means of installing the second story framing and siding. (T. 113-114. Finding No. 32). It had been successfully used by appellee on a similar project the previous year. (T. 382).

Excavation and earth work was commenced as scheduled about May 4 and continued throughout May. Some delay occurred in excavation because of frozen subsoil, but by May 20, the ground was thawed sufficiently to complete excavation and commence pouring the footings. Thereafter excavation, backfill and compaction proceeded normally. (T. 117-118, 123, 124. Ex. 46, Report No. 11-36).

Appellant delivered the plywood siding to the dock in Seattle on May 5 for trans-shipment to Alaska. (Ex. 3, 4. Answer to Request for admission No. 4 T. 405). It arrived at the job site on May 26 or 27. (Finding No. 5).

On about May 29, while construction was progessing normally, appellee's superintendent examined some of the plywood and questioned whether it met specifications. He immediately notified his Seattle office, which in turn contacted appellant's sales representative by telephone. The representative assured appellee that the plywood would meet specification. (T. 79-80. Ex. 9). By a letter dated June 1, appellee again notified appellant that the plywood appeared to be inferior and remarked that it hoped the plywood met specifications. Appellant again orally notified appellee not to worry about the specifications.

(T. 133, 334). Relying on these assurances, appellee went ahead with its plans to use the material.

During June, appellee increased its manpower on the job, (Ex. 46, Reports No. 36-61), and the job was progressing well. (T. 128, 387, 392, 430; Ex. 46, Reports No. 36-61). Framing commenced on Buildings 846, 847 and 848 during this period and siding was applied to them in the latter part of June. (T. 130). Some problems were encountered during June, but these did not materially hinder the work related to framing and closing in of the buildings. They were not of an unusual nature for this type of project and were correctable by putting on more men. (T. 130, 151, 160, 262, 387, 392, 433, 434).

On the afternoon of July 1, after appellee had begun installing the plywood, it was advised by a field memorandum from the project engineer that the material did not comply with specifications and would have to be removed and replaced by material meeting specifications. (Finding No. 5). Appellee's superintendent did not consider this memorandum to be a stop work order and continued on Monday, July 3, to apply the siding to buildings in progress. (T. 153-155. Finding No. 5).

On July 3, appellee was advised in writing by the resident engineer that the plywood was not acceptable and that all costs incurred in replacement of the siding would have to be borne by appellee. (Finding No. 6). On this date Buildings 846, 847 and 848 had

been fully sheathed and another building was partially enclosed. (T. 156, 281). The remaining buildings were in a stage of construction whereby siding would soon have been applied to them. (T. 157, 159, 160). Following receipt of the July 3 notice of rejection, appellee sorted the remaining plywood so as to be able to utilize those pieces apparently meeting specifications and continued application of the siding. (T. 161, 389, 430. Finding No. 7). Removal and reapplication of defective siding occurred to the extent possible. (T. 161).

Following a meeting at the job site, a settlement was reached under the terms of which appellant allowed appellee a credit of $2,000.00 to cover application and removal of the defective siding and for reloading and sorting the unused sheets on hand. (Finding No. 8). In addition, appellee agreed to replace the thirteen hundred defective sheets with material meeting specifications. (Finding No. 8).

Because of the large number of defective sheets in the shipment, appellees job plan was severely disrupted. Up to that time it "was going along real good." (T. 387, 471). From that time on appellee operated inefficiently in the overall prosecution of the work. Appellee "sort of started shifting things around. . . . We couldn't keep on operating as we figured, so the crew that was on the siding, we pulled them off and put them on something else trying to keep them busy. Our framing was up. We couldn't go beyond the second floor." (T. 159). "The whole

schedule was disrupted and nothing was going the way we had it planned. We operated very inefficiently, and that's about the scope of it." (T. 168). One of appellee's foremen, Ed Thompson, aptly described the opeartion as "just a hunt and peck sort of thing." (T. 391).

On August 3, the initial replacement shipment arrived at the job site. It contained 1300 sheets. The Corps of Engineers immediately notified appellee in writing that it considered most of this shipment defective. (Finding No. 9). Arrangements were made to have the shipment graded by a representative of the plywood division of Pittsburg Testing Laboratory. This was accomplished on August 8 and 9. (Finding No. 9). Out of the shipment of 1300 sheets, 610 were defective. (Finding No. 10).

The rejection of 47 percent of the initial replacement shipment further upset appellee's revised plans and caused additional delays and hinderances to the efficient prosecution of the work. "It just upset everything that we had planned at that stage." (T. 184). Appellee decided at this point to go forward with the framing of the remaining buildings in order to be able to place the roof trusses so as to minimize the losses resulting from the rejection of the replacement shipment and to ready the buildings for rapid closing when the next shipment arrived. (T. 189-190, 209, 210). As expressed by Billimek, "I think at that point I had to make up my mind I might as well bull the framing through and frame it all up

to the roofs, and just concentrate on getting the roofs on the buildings and forget about the siding." (T. 189). Crews were shifted around. "It wasn't very productive to switch back and forth, but it was better than laying them off and having to rehire them." (T. 186). Prosecution of the work in the sequence planned was important, according to Billimek, because maximum labor efficiency is obtained by utilizing the same crews on the same tasks throughout the project. "Whatever you start a crew on, it could be the framing, the joist crew putting the rafters up, the siding crew, you try to keep that crew on a particular job throughout the whole project, because if there is a problem it will be developed the first day and if there is something they are all familiar with it from then on, and there shouldn't be no more problems after they get lined out and know what they are doing." (T. 116).

The second replacement shipment arrived at the job site on August 23. (T. 210, Finding No. 11). It contained 610 sheets of which an unbelievable 225, or 37 per cent, were defective. (Finding No. 11). Further sorting was required; (T. 214); it had "never stopped." (T. 390). Appellee again undertook to replace the defective sheets in the second replacement shipment and on September 24, the third replacement shipment containing 225 sheets arrived at the job site. (Finding No. 12). These enabled appellee to complete enclosure of the structures.

Despite the fact that appellee's construction schedule called for the closing in of all of the buildings

by August 5, Ex. 1-F, they were closed in on approximately the following dates;

Building No.	*Date Closed-In*
848	August 9
847	August 30
846	August 31
855	September 5
877	September 6
876	September 9
875	September 13
821	October 7
856	September 9.

(Finding No. 17). This is significant in the light of the fact that by July 3, Buildings 848, 847, and 846 had already been enclosed and work on the remaining buildings was on schedule.

Contrary to appellant's assertions, the court did not find that there were always enough sheets available to the contractor to prosecute the work as planned. The trial court did find that "the evidence does not establish what delay, if any, lack of available suitable finding may have caused (appellee), (Finding No. 17). This finding was premised on the fact, as found by the court in Findings No. 13-17, that by use of satisfactory sheets from each shipment appellee could have enclosed more buildings following receipt of each shipment than it did. Also bearing on the finding that appellee failed to sustain its burden of proof on the issue of damages for delay were the findings that

the project suffered from delays not related to the siding. (Finding No. 28). Although there was unrebutted testimony that none of the delays specified in Findings No. 28 and 29 delayed closing in of the buildings or materially delayed completion of the project, (T. 223-230, 151), appellee does not challenge the findings as "clearly erroneous." The causal relationships are simply too interwoven to permit such a contention, at this stage of the proceedings.

The Court further found, however, that "by reason of the fact that the plywood siding supplied by (appellant) did not meet contract specifications, it became necessary for (appellee) to revise its plan of work by erecting the framing and thereafter applying the plywood siding by craftsmen working from scaffolding." (Finding No. 32). This change in the plan of work, the court found, increased the cost of applying a sheet of plywood siding about three times. (Finding No. 32).

Damages of $26,000.00 were awarded as a result of the required changes in the plan of work. (Finding No. 35).

They were computed as follows:

$10.00 per man hour per workman

3 man hours — $30.00 sheet

1300 sheets x $30.00 = $39,000.00

(Finding No. 34). The cost of $30.00 for application of each of the 1300 sheets of plywood took into con-

sideration the costs of sorting the plywood, transporting it from the sorting stockpile to the building site, loading and unloading it, delivery to carpenters for application, and installation. Finding No. 34-A. Two-thirds of the total cost of applying the remaining 1300 sheets was the result of the revision of the work plan. (Finding No. 35).

Judgment was accordingly entered in favor of appellee for $26,000, together with several other relatively minor items of damage, less an offset of approximately $10,000 over which there was no dispute. This appeal followed.

SUMMARY OF ARGUMENT

Appellant's grounds for appeal are predicated on the insufficiency of the evidence to support findings made by the lower court. Each finding assailed by appellant is supported by the evidence; none is "clearly erroneous."

Appellee was unquestionably damaged by appellant's incredible lack of performance. Determination of the amount of damage was difficult. In these circumstances the trial judge has "wide latitude" in assessing damages and appellant "is not entitled to complain that (the damages) cannot be measured with the same exactness and precision that would otherwise be possible."

ARGUMENT

Appellant's first contention is that the trial court

"affirmatively found" that there was always adequate suitable plywood on the project, and therefore appellee was not damaged by appellant's failure to supply siding meeting specifications. (Appellant's brief, 8-9).

The trial court did not find that there was sufficient siding on the project at all times. It found only that "the evidence (did) not establish the delay, if any, caused by lack of suitable plywood." (Finding No. 17). The court simply found that following each shipment, by utilization of all the acceptable sheets from the shipment, appellee could have enclosed more buildings than it did. (Finding Nos. 13-17). This is not equivalent to a finding that there was always suitable plywood on the site to enable appellee to prosecute the work as originally planned; it is a determination that appellee did not sustain its burden of establishing damages for delay, as distinguished from damages for loss of efficiency and productivity. The court obviously felt that the non-plywood related delays to the project, as set forth in Findings No. 28 and 29, coupled with the difficulties in determining whether the project would have been delayed if appelle had applied all the acceptable sheets from each shipment on one building after another so as to enclose fully one or more buildings as soon as possible, prevented appellee from sustaining its burden of proof on the delay issue. This determination, however, is unrelated to the issue of whether appellee was required to change its work plan and incur increased

costs in completion of the project because of the defective plywood.

Appellant's next claim is that the findings made by the court of the damages for disruption to appellee's plan of work are not supported by the evidence. This finding is likewise fully supported by the evidence.

The trial court found that appellee's "plan of work provided that the plywood on the second story may be applied to the framing while it was lying on the deck in a horizontal position. Thereafter the wall sections were to be raised to a vertical position by the use of hydraulic jacks. This technique accelerated construction and was an economical method of erecting the second story framing and siding. Building 846, 847, and 848 were constructed in this manner. By reason of the fact that the plywood siding supplied by defendant did not meet contract specifications, it became necessary for plaintiff to revise its plan of work by erecting the framing and thereafter applying the plywood siding by craftsmen working from scaffolding." (Finding No. 32).

There was ample evidence to support the finding that because the defective material the job plan had to be radically altered. Billimek testified that constant sorting of plywood was required, carpenters had to be shifted about to prevent their being discharged and rehired, and re-handling and transportation of the materials throughout the site was necessary. (Tr. 159, 168, 184, 189-190, 209, 210). See also Finding No.

34-A. Second story walls were raised without siding to utilize the crews and keep the job progressing while awaiting further shipment. (Tr. 189).

Appelle contends that on the basis of this finding the court should have awarded damages only for the loss of efficiency in applying the plywood to the second story, not to the foundation and the first floor. (Appellant's brief, p. 6-7, 12-14). This argument overlooks the increased costs to appellee in applying the two lower tiers as set forth in Finding 34-A. Appellee's job superintendent, a construction man of long experience, (T. 104-105), testified that because of the large percentage of defective sheets the shipments had to be stockpiled and sorted prior to use. (T. 187). This required the time of two laborers, a carpenter foreman, a teamster and a fork lift part time. (T. 187). After sorting, the acceptable sheets had to be loaded on a truck and delivered from the stockpile to the area on the site where the material was being used at the time. There it was unloaded and moved into position where it could be handled by carpenters. Some sheets had to be cut or sawed into half. Order Supplementing Findings of Fact, Finding No. 34-A. All of these additional costs, none of which were disputed by appellant, were required for the installation of the entire remaining 1300 sheets.

In addition, it is also undisputed that appellee was unable to install the second floor siding by use of the tilt up method. (Finding No. 32, T. 189). This was

costly because instead of being able to nail the sheets to the framing on the ground, application from scaffolding was required. It necessitated the renting of scaffolding, laborers handing the 4′x8′ sheets to carpenters, nailing from scaffolding, and extra handling for cutting and fitting adjacent to windows. (Finding No. 34-A). Contrasted with appellee's initial plans for application of the siding, a plan found to have been highly successful on a similar project the preceding year, the technique used was clumsy, inefficient, and costly. In addition, as testified by Billimek, a general disruption of the work plan occurred. (T. 184, 189). In fact, he said that rejection of much of the second shipment "upset everything we had planned at that stage." (T. 184). The crew, he said, was not organized and when they went to work in the mornings "they just put their overalls on and worked instead of being told what to do." (T. 247).

Appellant further complains that the method used by the trial court in computing appellee's damages were not supported by the evidence. The court found that as a result of the changes required in appellee's work plan for the installation of the second floor siding, its costs were increased about three times. (Finding No. 32). This finding was based on the testimony of Billimek that "if we could have applied the siding the way we had it planned, in order to have the walls laying down and applying the siding, the way we had to do it cost us about three times as much. (T. 247-248). Notice that the testimony related to

"the siding." It was not limited to "second story siding." The court was warranted in inferring that the testimony referred to related to the overall siding costs. He further testified, however, that the overall loss of labor efficiency was about 20%. (T. 247). No award was made for this item even though the testimony was not disrupted. The court no doubt, however, took such testimony into consideration in arriving at its overall findings.

The monetary award was computed as shown in Finding Nos. 33 and 34. The court found that three manhours per sheet were required to install the 1300 sheets in the replacement shipments. Appellee's costs per man hour were found to be $10.00, a figure not disputed by appellant.

The finding that three man hours were required to apply a sheet of plywood to the end of a building is supported by the testimony of appellee's superintendent, Ex. - I. Billimek T. 333. He testified that in one day a (five man) group with that type of building should probably *cover* 20 or 25 feet down one side of the building. The interrogation on cross-examination continued:

"Q. Well how many sheets during a 9 hour period, how many sheets could they put up and remove?

"A. Well, there are half sheets, and I don't know how many sheets it would take. You are talking about sheets. Maybe it would take a small piece that would have to be cut and fitted. It takes longer to put that on than a full sheet.

I think they should *cover* that building between 20 and 25 feet down one side, either the side of the building or the back. The ends would be faster as there are no windows, but that's an average on the side of the building. (Emphasis supplied.)

"Q. How long would it take to do one end of a building?

"A. They should complete one end, that crew that we mentioned awhile ago should complete one end in one day. Of course the ends are simple, they are all full sheets. And that's under good working conditions.

"Q. Pardon?

"A. That's under good working conditions.

"Q. That's 18 sheets on the ends, plus the other material, is that right?

"A. Yes.

"Q. So that four men in nine hours, maybe they could do . . .

"A. We are talking about five men, weren't we?

"Q. Let's add another one in there then. Let's say five, and that would be about 45 man hours and we should do at least 15 sheets. That's about three man hours per sheet. That's a pretty healthy estimate, isn't it, Mr. Billimek?

"A. Under certain conditions it's not bad."

Although appellant contends that Billimek's estimates were directed to removing and replacing siding, it is apparent that the testimony related solely to placing the siding. This is evident from the witnesses' testimony that the group should cover one side of a building down 20 to 25 feet in one day and complete one end in one day. While the question

called for an estimate of the number of sheets which a five-man group could remove and replace in one day, the answer clearly was phrased in terms of the area which could be covered in one day.

The answer was obviously satisfactory since no objection was made by the cross-examiner that it was not responsive. Nor was the subject pursued further. In light of the witness's testimony and his demeanor and inflections of voice and expression at the time of relating it, as observed by the trial court, the court was warranted in finding that the testimony related to the time required to install plywood, and not to its removal and reinstallation.

At the very least the testimony is ambiguous. It was therefore the province of the trial court to resolve the ambiguity. "The determination of the factual content of ambiguous testimony is for the trial court, and such determination can be set aside on review only if 'clearly erroneous'." *United States v. National Assoc. of Real Estate Boards,* 339 U.S. 485, 495, 496, 94 L.Ed. 1007, 1016, 70 S.Ct. 711 (1950); *Guzmen v. Pichirilo,* 369 U.S. 698, 702, 8 L.Ed.2d 205, 209, 82 S.Ct. 1095 (1963).

Determination of the ambiguity, if any, in the Billimek testimony was resolved against appellant by the trial court, and its findings were not "clearly erroneous." Rule 52(a), Federal Rules of Civil Procedure.

Certainly one cannot say with respect to any of the findings challenged one "is left with the definite and firm conviction that a mistake has been committed," *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 92 L.Ed 746, 765, 68 S.Ct. 525 (1948). From the trial judge's carefully prepared findings it is apparent that he carefully considered and weighed the evidence. This is further reason for giving them the full benefit of the presumption that they are supported by the evidence.

Moreover, with respect to the damages awarded, substantial latitude is allowed. Here the fact of damage is certain. The basis of appellant's complaint is that the amount of damage has not been determined with mathematical precision, that it is the product only of opinion. This, however, is not insufficient. As this court remarked in *Kupoff v. Stepovich,* (9th Cir. 1958) 261 F.2d 693, a case arising in Alaska, quoting from *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359, 11 L.Ed 684, 47 S.Ct. 400, "a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible." Under such circumstances, it is enough "if there is a basis for a reasonable inference as to the extent of damages. *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 90 L.Ed. 416, 66 S.Ct. 91. Absent Alaska decisions on the question, this court

should apply the general rule that "a trial court has wide discretion in determining the amount of damages for breach of contract," *Distillers Distributing Corp. v. J. C. Millet Co.,* (9th Cir. 1963), 310 F.2d 162, applying California law; *Robert E. McKee General Con., v. Insurance Co. of No. America,* (10th America Cir. 1959), 269 F.2d 195, applying New Mexico law; *Walla Walla Post District v. Palmberg,* (9th Cir. 1960), 280 F.2d 237, applying Washington law; 78 A.L.R. 858.

Unquestionably appellee's damages were difficult to determine. Much evidence was introduced on the issue, and the trial court unquestionably was faced with a difficult and complex task in arriving at a dollar award of damages. Yet it is apparent from the Court's Memorandum to Counsel and Order that the Court endeavored to achieve an award "which would be fair and just between the parties." As respects the appellant, the damages are fair and just and are based upon reasonable inferences as to the extent of appellee's loss. Appellant's seemingly reckless disregard of its contractual obligations hardly entitle it to complain that the damages for its irresponsible conduct cannot be measured with precision. The fact of damage is certain, and the award, under all the circumstances, was based upon a dispassionate and carefully reasoned analysis of all the evidence

COSTS:

Appellee was entitled to its costs in the discretion

of the lower court under Rule 54(d), Federal Rules of Civil Procedures. Since judgment was rendered in appellee's favor it was the "prevailing party," *Bentley v. Sunset House Distributing Co.,* (9th Cir. 1966), 359 F.2d 140, 6 Moore's Federal Practice 1305, §54.70(4).

The costs taxed were proper under 28 U.S.C. 1920. They were limited to fees of the Clerk and Marshal, 28 U.S.C. 1920(1); fees of the court reporter, 28 U.S.C. 1920(2); witness fees as fixed by 28 C.F.R. 21.3, 28 U.S.C. 1920(3); and for copies of detailed construction plans for the project, 28 U.S.C. 1920(4). No showing has been made that the amounts taxed are improper. In absence of an affidavit by appellant challenging the validity of the cases allowed, it is in no position to object. *Swan Carburetor Co. v. Chrysler Corp.,* (6th Cir. 1945), 149 F.2d 476. Finally, no citation of authority should be required for the preposition that appellant is not in a position to object to the items in the cost bill which were disallowed.

CONCLUSION

The judgment should be affirmed. The findings are in no sense "clearly erroneous." The damages, difficult to express in monetary terms due to the numerous and complex operations involved, were fair and reasonable. The measure of appellant's culpability is so great that appellant should not now be heard to complain that the trial judge was required to arrive at his damage award on the basis of a time and motion study. The trial judge made the award on the basis of the best evidence available. This is sufficient.

The protest of the cost bill is specious. Costs awarded were permissible by statute. Complaint may not be made on appeal as to costs disallowed.

Respectfully submitted

Charles E. Cole
Attorney for Appellee

218 Lavery Building
Fairbanks, Alaska 99701
Telephone: 452-1124

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

s/ Charles E. Cole
Attorney for Appellee

No. 21532

IN THE

United States Court of Appeals For the Ninth Circuit

MAUK SEATTLE LUMBER CO.,
Appellant,

v.

ALCAN PACIFIC CO.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

REPLY BRIEF OF APPELLANT

CASEY & PRUZAN
Attorneys for Appellant

Office and Post Office Address:
30th Floor, Smith Tower
Seattle, Washington 98104

METROPOLITAN PRESS SEATTLE, WASH.

SUBJECT INDEX

TABLES OF AUTHORITY

Table of Cases

IN THE

United States Court of Appeals For the Ninth Circuit

MAUK SEATTLE LUMBER CO.,
Appellant,

v.

ALCAN PACIFIC CO.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

REPLY BRIEF OF APPELLANT

REPLY STATEMENT OF THE CASE

The settlement made between the parties ended all issues except those which might arise from the replacement shipments (Finding No. 8, R. 300, Appellee's brief, p. 6). The first replacement shipment arrived on August 3rd, and at that date appellee alleges because of rejection of a portion of this shipment, appellee had to alter its proposed method of siding erection and "go forward with the framing of the remaining buildings (without siding) in order to be able to place the roof trusses . . . and to ready buildings for rapid closing when the next shipment arrived" (Appellee's brief, pp. 7, 8).

Appellee's employees made a daily record of the construction progress—daily reports—which listed activity on the various buildings and other phases of the work, weather conditions, number of men on the job, and any delays or hindrances to the job progress. (Ex. 46, not made a part of the record at the suggestion of the clerk because of its bulk.)

The Building Histories appearing in the record at R. 231-271 are taken from these daily reports and tabulate construction progress on an individual building basis, and show how each building came up. Also, the tabulation of "DELAYS—AS LISTED ON DAILY REPORTS," R. 221-228, is an extraction and tabulation of this information from the daily reports (Ex. 46). These Indexes were used by counsel and the court in the progress of the trial (R. 136).

What was the situation on August 3, the date the first replacement shipment arrived at the site? Appellee would have us believe there was little or no good siding available. Appellee's evidence shows conclusively to the contrary.

All eight buildings took a total of 1822 sheets of siding (Finding No. 13, R. 301). On August 3rd, the appellee had some 600 sheets of siding applied, all of which were defective or would be ruined in the process of removal (T. 305, 306). But at that time there were 550 good sheets still available from the first shipment (T. 306) and counting the second shipment which had 690 good sheets (Finding No. 14, R. 302) appellee's superintendent had to admit that as of August 3rd he had over a thousand sheets of good plywood on the job site.

Siding was available as follows:

Defective siding on the buildings	600 sheets
Good siding from original shipment	550 sheets
Good siding from 8-3-61 shipment	690 sheets
Total siding, already on the buildings or GOOD siding available for remaining buildings to be erected	1,846 sheets

This left more than enough *good* sheets from the original shipment and the August 3rd delivery to complete the project, except for removing and replacing defective sheets.

If this is correct, appellee was free to go ahead with the new construction—using any construction method it desired—and hold off removing any replacing siding from the conpleted buildings until the second replacement shipment arrived on August 23. Its own records show that this is exactly what it did. This clearly appears from the flurry of activity—removing and replacing siding—on buildings 846, 847, and 855, recorded in the daily reports for August 25 through 31 (Ex. 46/Building Histories, R. 238 and 242; Finding No. 22, R. 304, 305).

Appellee admitted that it left the rejected siding on those buildings until siding demands for other buildings yet to be completed were satisfied (T. 306, 307).

REPLY ARGUMENT OF APPELLANT

Assignment of Error No. 1

Appellee argues that "second story walls were raised without siding to utilize the crews and keep the job progressing while awaiting further shipment." This is the alleged reason for the change in construction method (Ap-

pellee's brief, p. 14). The only other argument involved sorting and handling of siding for which appellee has been awarded damages and from which no appeal is taken.

No attempt is made by appellee to explain what its crews did with the good siding it had on hand from the original and subsequent shipments. Appellee's own records show that its construction progress was according to a practicable schedule required by the government (Finding No. 25, R.306, and Ex. A and B to Findings, R. 314 and 315).

In fact, appellee's testimony in describing the erection of roof trusses on buildings before any siding was put on them is shown by their own records—again—to be patently false. Appellee's job superintendent testified:

> "A. August 7, 1961, roof trusses set on building 877 *without any siding* . . . August 8, 1961, roof trusses set on building 876, *without any siding*. August 10, 1961, roof trusses set on building 875, without any siding."

Appellee's own daily reports, Ex. 46, shows that in fact, for buildings 876 and 877, *the siding was applied to the second floor walls on* August 5th, two to three days before the roof trusses were erected and in full compliance with the time sequence for the horizontal application method *ALLEGEDLY* not used by the appellee (Ex. 46/Building Histories, R. 261, 265).

For building 875 it is noted that, while no siding is indicated on the daily reports prior to setting the roof trusses, siding was applied on August 17th which was obviously available from the stock on hand on August 3rd (Ex. 46/Building Histories R. 257, 258).

It is clear that appellee not only always had the opportunity to use its horizontal application method but that it in all probability did use it on some buildings it alleged it did not.

Conversely, appellee had elected to NOT use the horizontal method on at least one building *before* any question of rejection came up—on one of the buildings where it alleged the method was used. That is the case of Building 847. It is firmly established that the first siding on any building was placed on June 26, 1961 (R. 311, Finding No. 21, R. 304). However, on Building 847 the second floor framing started as early as June 15th and the roof trusses were set on June 24th—two days before any siding was applied anywhere and, in fact, a full week before any siding was put on that particular building (Ex. 46/ Building Histories, R. 240, 241).

Repeated references to high wind velocities which are found in the daily reports which described concrete block walls blowing down and entire buildings being out of plumb, show the real reason why appellee exercised discretion in its attempts to tilt up wall sections with siding applied (Ex. 46/Delays—As Listed in Daily Reports, R. 221-228).

Assignment of Error No. 2

Appellant takes the position that the alleged method change involved only one-third of the siding, second floor, at any rate.

Appellee again attempts to use the sorting effort for which it has already been compensated to justify added costs to applying siding on the first floor and foundation

walls (Appellee's brief, p. 14). It also mentions bringing material to the buildings and cutting some sheets to fit—procedures which certainly were part of any method of application.

The reference to appellee's job superintendent's testimony (Appellee's brief p. 15) is a reference to applying siding *horizontally*. It was only the one-third of the siding allocated to the second floor walls that was to be applied with the walls "laying down."

The court's assumption that all of the siding would be affected by the alleged change in method is, in fact, clearly erroneous.

Assignment of Error No. 3

Appellant challenges the finding of three man-hours per sheet required for applying (as opposed to removing and re-applying) a sheet of plywood.

The fact that there is no other evidence or testimony on this issue other than that quoted in appellant's brief, R. 331-333, is evidenced by appellee being forced to rely upon exactly the same testimony for this proposition, and no more.

Appellee had put in issue the time required to "remove and replace defective siding" by making claim for some 4,360 man-hours and nearly $40,000 for that item (Ex. 45). The term "remove and replace siding" originates with appellee in these back-charges and in the daily reports (Ex. 45, 46). In order to demonstrate that those back-charge claims were grossly exaggerated and, in fact, in a large part fictitious, the cross-examination of appellee's construction superintendent found in the tran-

script, pages T. 320 through T. 333, was undertaken. The back-charges were clearly the issue (T. 320, 326). Not less than 17 times during this testimony was reference made to the subject matter, i.e., *removing and replacing* siding. Never was a time factor for removing only or putting up only discussed.

Appellee's attempt to take the word "cover" out of context (Appellee's brief, p. 18) and give it a meaning of installation only, excluding the removal operation, does violence to the meaning of the tesimony. There is a dearth of evidence on the time required to place or install a sheet of plywood, and the court's damage formula contains an erroneous factor.

Assignments of Error Nos. 4 and 5

Appellant's position was that another multiplication factor used by the court in its damage formula, a factor of three times the cost of the alleged revised method, was based solely on speculation and conjecture of a biased witness for appellee. Appellee's brief points to no facts whatsoever which give a rational basis for this opinion. This does not comply with the requirements that the plaintiff provide a rational basis for assessment of damages, and is contrary to the holding previously cited in *U.S. v. Griffith, Gornall* & *Carman,* 210 F. Supp. 11.

Assignment of Error No. 6

The rules of court place upon the nominal prevailing party the right to submit a cost bill in conformity with those rules. Appellee seems to argue that a complete redrafting of its cost bill by the clerk of court, occurring well after the ten-day limit provided by the rules, will

cure the defects in a cost bill which paid no heed to the rules. In effect, this is the clerk's cost bill and not appellee's.

CONCLUSION

The evidence does not support the trial court's findings and conclusions which award $26,000.00 in damages to appellee arising out of an alleged delayed delivery of approximately $4,300 worth of plywood siding. The judgment of the trial court should be reversed as to that award of damages and as to allowing costs and attorney's fees to appellee as prevailing party, with a resulting judgment in favor of apppellant of the net amount of its cross-claim of $10,641.76 exceeds the $1,117.28 in appellee's damages from which no appeal is taken.

Respectfully submitted,

Casey & Pruzan

By John F. Kovarik
Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

John F. Kovarik
Of Attorneys for Appellant

in the

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

No. 21535

Peter Raich and
Wanda J. Raich,
Petitioner - (Appellant),

vs.

Commissioner of Internal
Revenue,
Respondent - (Appellee).

Appeal from the
Tax Court of
the United States

Honorable
Graydon G. Withey
Judge

Appellant's Brief

Clarence J. Ferrari, Jr.
300 West Hedding Street
San Jose, California

Attorney for Petitioner - Appellant

INDEX TO BRIEF

LIST OF AUTHORITIES CITED

PAGE

Miscellaneous:

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 21535

PETER RAICH AND WANDA J. RAICH

v.

COMMISSIONER OF INTERNAL REVENUE

ON APPEAL FROM THE TAX COURT OF THE UNITED STATES

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a decision of the Tax Court of the United States entered on August 15, 1966, determining deficiencies in Appellants' income tax for the taxable years 1961 and 1962. Appellants have timely filed a petition for review of the Decision of the Tax Court and this Court's jurisdiction is based upon 26 U.S.C. 7482.

STATEMENT OF THE CASE

This appeal is taken for the purpose of reversing the decision of the Tax Court of the United States which was submitted to the said Tax Court on the basis of a complete

stipulation of all material facts and documentary evidence. The Court below filed an opinion, findings of fact and conclusions of law and an order for judgment under which Appellants' prayer for relief was denied.

A summary of the pertinent facts is as follows:

On January 3, 1961, Peter Raich, one of the Appellants herein, transferred to Pete Raich Sheetrock Taping Service, Inc. all of the assets and liabilities of a sheetrock and drywall contracting business that he had conducted for many years as a sole proprietorship. For accounting purposes, the sole proprietorship had as its taxable year the calendar year and operated and employed the cash basis method of accounting for tax purposes. (R. 84)

The total assets transferred to the corporation amounted to $88,613.39, of which $77,361.66 were represented by trade accounts receivable. The accounts receivable had not been reported as income by the sole proprietorship but were reported as income by the corporation in the fiscal years in which they were collected. The liabilities assumed by the corporation amounted to $45,992.81 of which $37,719.78 was represented by trade accounts payable which were in existence as of the date of the transfer. None of the accounts payable were deducted for income tax purposes by the sole proprietorship, but were deducted by the corporation in the period in which they were paid. In exchange for the transfer, the Appellants received 2,500 shares of Ten ($10.00)

Dollar par value common stock valued at $25,000.00 and an unsecured promissory note in the face amount of $16,280.58. (R. 85, 86)

The Commissioner of Internal Revenue asserts that Appellants must report, as taxable income, the excess of the amount of liabilities assumed by the corporation over the "adjusted basis" of the assets transferred by Appellants to the corporation. In support of his assertion, the Commissioner of Internal Revenue contends that the "adjusted basis" of the assets transferred to the corporation is $11,251.73. In making this computation, the Commissioner maintains that a zero basis should be assigned to the accounts receivable. In support thereof, the Commissioner cites Section 357(c) of the Internal Revenue Code of 1954. (R. 86-89)

SPECIFICATION OF ERRORS RELIED UPON

1. The Tax Court erred in construing Section 357(c) of the Internal Revenue Code of 1954 as applying to the transfer of Appellants' sole proprietorship to Appellants' controlled corporation in a transaction which qualified under Section 351 of the Internal Revenue Code as a tax-free exchange.

2. The Tax Court erred in determining that trade accounts receivable in the hands of the cash basis taxpayer have a zero basis for purposes of determining the "adjusted basis of property transferred" under Section 357(c).

3. The Tax Court erred in not determining that accounts payables are not "liabilities" within the meaning of Section 357(c).

SUMMARY OF ARGUMENTS

The Commissioner of Internal Revenue seeks in this case to apply Code Section 357(c) to the incorporation of a cash basis taxpayer. The Commissioner's entire case is dependent upon his contention that the trade accounts receivable of a cash basis taxpayer should be assigned a zero basis for the purpose of determining whether or not Section 357(c) is applicable to a transaction which qualifies as a tax-free exchange under Section 351. The Tax Court agreed with the Commissioner that Section 357(c) is applicable and that the accounts receivable of a cash basis taxpayer should be assigned a zero basis for purposes of this section. The Appellants submit that Section 357(c) is not applicable to Appellants' transfer insomuch as the legislative history of the section and the language of the section itself clearly indicates that the section was not intended to apply to the transfer by a cash basis taxpayer of accounts receivable and accounts payable to a controlled corporation. The Tax Court, recognizing that its application of Section 357(c) to such transfers will hinder and limit the incorporation of cash basis businesses, concluded that it was compelled to so hold by the language of Section 357(c) itself. Appellants submit that not only was the section not

intended by Congress to apply to such a transaction but, further, that the language of the section itself is unclear when applied to cash basis methods of accounting and therefore, this language must be interpreted in accordance with the well-established intent of Congress to permit tax-free exchanges.

Appellants further submit that even if Section 357(c) is applicable to Appellants' transfer of accounts receivable and accounts payable, there is no logical basis for the contention by the Commissioner of Internal Revenue that accounts receivable should be assigned a zero basis and that accounts payable should be valued at their face amount for purposes of the Section 357(c) computation. The only logical application of this section would assign a tax basis to the accounts receivable equal in amount to the value of the accounts payable or, alternatively, to assign to the accounts payable the same basis that is assigned to the accounts receivable under the Commissioner's contention. The Appellants' argument must necessarily be sustained in view of the fact that accounts receivable and accounts payable to a cash basis taxpayer are treated in the same manner under the tax laws, i.e., accounts receivable are not recognized until they are collected and accounts payable are not recognized until they are paid. Therefore, the position of the Tax Court that accounts receivable and accounts payable should be treated differently for purposes of Section 357(c) is completely untenable.

ARGUMENT

I.

SECTION 357(c) OF THE INTERNAL REVENUE CODE OF 1954 WAS NOT INTENDED TO APPLY TO THE TRANSFER BY A CASH BASIS TAXPAYER OF ACCOUNTS RECEIVABLE AND ACCOUNTS PAYABLE WHERE THE TRANSFER QUALIFIES AS A SECTION 351 EXCHANGE.

On January 3, 1961, Appellant, Peter Raich, transferred the assets of his contracting business to a corporation controlled by him and formed for the purpose of receiving the assets and assuming the liabilities of that business.(1) The Tax Court found that the transaction qualified under Section 351 but that "a literal interpretation of Sections

---

(1) The assets and liabilities transferred to the corporation were as follows:

Assets		
Cash		$ 1,045.40
Trade accounts receivable		77,361.66
Receivables		1,833.97
Prepaid rent		125.00
Equipment	$13,626.30	
Less: Accumulated depreciation	5,378.94	8,247.36
Total		$88,613.39

Liabilities	
Trade accounts payable	$37,719.78
Notes payable	8,273.03
Total	$45,992.81

351(a)(1) and 357(c) compels the application of Section 357(c) to the transaction in question". The application of Section 357(c) in the instant case results in a tax being extracted in a situation which could not have been contemplated when Congress enacted that section. Its application to cash basis taxpayers in general will greatly hinder tax-free incorporation and will encourage distortions in the transfers of cash basis businesses to controlled corporations. Recognizing this clear misapplication of Section 357(c), the Tax Court summarized its decision by stating:

> "In applying Section 357(c) to the facts herein, we are not unmindful that the result reached may conflict with the well-established intent of Congress to foster tax-free business reorganizations. However, in the absence of a clearly expressed congressional intent, we decline to adopt a construction of Section 357(c) which is supported neither by its language nor its legislative history."

Appellants will show herein that, contrary to the holding of the Tax Court, both the legislative history and the language of the section itself clearly supports their position.

A. <u>The legislative history of Section 357(c), viewed in light of this Court's decision in Easson is sufficiently clear to support Appellants' position</u>.

This case is one of first impression. Subsection 357(c) is entirely new in the 1954 Code and has no counterpart in any prior Internal Revenue Code. Subsection 357(c) provides as follows:

"(c) Liabilities in Excess of Basis.--
(1) In General.--In the case of an exchange--
(A) to which section 351 applies, or
(B) to which section 361 applies by reason of a plan of reorganization within the meaning of section 368(a)(1)(D)
if the sum of the amount of the liabilities assumed, plus the amount of the liabilities to which the property is subject, exceeds the total of the adjusted basis of the property transferred pursuant to such exchange, then such excess shall be considered as a gain from the sale or exchange of a capital asset or of property which is not a capital asset, as the case may be."

Nowhere in the legislative history of Section 357(c) is the purpose for its enactment revealed.[2] It is therefore necessary to examine the theory and purpose of Sections 351[3] and 357, subparagraphs (a) and (b), as they existed prior to the enactment of subsection (c) of Section 357.

Until the decision in the United States v. Hendler, 303 U.S. 564 (1938), the problem of the assumption of liabilities in a reorganization had not been considered. In Hendler, the Supreme Court held that the assumption of liabilities in an otherwise tax-free reorganization would be treated as the equivalent of the payment of cash to the transferor and taxable to the extent of any

---

(2) See H. Rept. 1337, 83rd Cong. (1954), 3 U.S.C. Cong. & Admin. News (1954) and S. Rept. 1622, 83rd Cong. (1954), 3 U.S.C. Cong. & Admin. News (1954).

(3) Section 351(a) provides that no gain or loss shall be recognized on the exchange of property for stock or securities in a controlled corporation. However, Section 351(d)(1) contains a cross reference to Section 357 where the transferee assumes liabilities or acquires property subject to liabilities.

gain realized. Thereafter, Section 112(k) of the 1939 Internal Revenue Code was enacted to overrule the Hendler result and this section was subsequently re-enacted without major change in Sections 357(a) and (b) of the 1954 Code.[4] In order to property characterize the problem which Section 357(c) was intended to cure, one must necessarily examine the problems which arose under Subsections 357(a) and (b) and their predecessor. Those subsections provide generally that where it

---

(4) Sec. 357. Assumption of Liability.

Sec. 357(a) General Rule.- Except as provided in subsections (b) and (c) if--

(1) the taxpayer receives property which would be permitted to be received under section 351, 361, 371, or 374 without the recognition of gain if it were the sole consideration, and

(2) as part of the consideration, another party to the exchange assumes a liability of the taxpayer, or acquires from the taxpayer property subject to a liability,

then such assumption or acquisition shall not be treated as money or other property, and shall not prevent the exchange from being within the provisions of section 351, 361, 371, or 374, as the case may be.

Sec. 357(b) Tax Avoidance Purpose--

(1) In General.- If, taking into consideration the nature of the liability and the circumstances in the light of which the arrangement for the assumption or acquisition was made, it appears that the principal purpose of the taxpayer with respect to the assumption or acquisition described in subsection (a)--

(a) was a purpose to avoid Federal income tax on the exchange, or

(b) if not such purpose, was not a bona fide business purpose,

then such assumption or acquisition (in the total amount of the liability assumed or acquired pursuant to such exchange) shall, for purposes of section 351, 361, 371, or 374 (as the case may be), be considered as money received by the taxpayer on the exchange.

(2) Burden of Proof-- In any suit or proceeding where the burden is on the taxpayer to prove such assumption or acquisition is not to be treated as money received by the taxpayer, such burden shall not be considered as sustained unless the taxpayer sustains such burden by the clear preponderance of the evidence.

appears that the principal purpose of the taxpayer with respect to the assumption of liability in a reorganization is the avoidance of Federal income tax and if such purpose is not a bona fide business purpose, such assumption should be considered as money received upon the exchange. The situation which arose most frequently under the cases involved the transfer of mortgaged property. Where the theory underlying the enactment of Section 357(a) and (b) is applicable, the Courts have had little difficulty.(5) The reasoning of the courts in these cases is best expressed in Woodsam Associates, supra:

> "It is clear that there will not be a mere postponement of taxation, but possibly a complete tax exemption, if gain on the exchange in question is not presently recognized to the extent that the mortgage to which the transferred property was subject exceeded the petitioner's adjusted basis. (emphasis added)"

The purpose of Section 351 is to permit tax postponement. The purpose of Section 357(b) is clearly to prevent tax avoidance. It is submitted that the only logical explanation of Section 357(c) is to prevent tax avoidance in those situations not covered by Section 357(b). The most forceful authority for this proposition is the decision by this Court in Jack L. Easson v. Commissioner, 294 Fed.2nd 653 (9th Cir., 1961). This Court recognized in Easson that Congress had not foreclosed in 357(a)

---

(5) See Crane v. Commissioner, 331 U.S. 1 (1947); Parker v. Delaney, 186 Fed.2nd 455 (1st Cir., 1950), Cert. denied, 341 U.S. 926 (1951); Woodsam Associates, Inc. v. Commissioner, 198 Fed.2nd 357 (2nd Cir., 1952)

and 357(b) all opportunities for tax avoidance. It correctly held that Section 112(k), the predecessor to Sections 357(a) and (b) did not apply to the transaction in question. The transaction was therefore nontaxable under Section 112(b)(5) which was the predecessor to Section 351. In Easson, the taxpayer transferred real estate valued at $320,000.00 subject to a mortgage of $247,000.00 to his controlled corporation. The property transferred had an adjusted basis in the hands of the taxpayer of $87,000.00. The Tax Court concluded that unless a tax was imposed on the transfer, the taxpayer would receive a windfall since the stock acquired would receive a basis of zero under Section 113(a)(6). This Court, however, sanctioned the concept of a "negative basis" as the only logical alternative to the Tax Court's holding in view of the clear language of Section 112.(6) Most importantly, this Court went on to state that:

> "The taxpayer's case on this point is bolstered by the fact that 1954 Code contains a provision specifically covering the situation presented by this case. Section 357(c) of the 1954 Code expressly provides that if the transferred property is subject to liabilities which exceed the transferor's basis in the property then the excess is to be presently recognized as gain." (emphasis added)

This Court recognized in Easson that Section 357(c) must necessarily be directed at the problem not solved by Section 357(b) -- the problem of a "negative basis" for

---

(6) See Cooper, Negative Basis, 75 Harv. L. Rev. 1352 (1962)

stock received in a tax-free exchange. The enactment of Section 357(c) clearly eliminates the need to resort to the concept of "negative basis" as a means of preventing the avoidance of tax in cases involving mortgaged property. This construction of the statute is the only construction consistent with the example found in the Senate Finance Committee Report No. 1622, 83rd R. D. Long., 2nd Sess. (1954) at page 270:

> "Subsection (c) provides that if an exchange to which §351 (relating to a transfer to a corporation controlled by the transferor) is applicable or to which §361 (relating to the nonrecognition of gain of loss to corporations) is applicable by reason of a §368 (a) (1)(D) reorganization, if the sum of the amount of the liabilities assumed plus the amount of the liabilities to which the property is subject, exceeds the total of the adjusted basis of the property transferred pursuant to such exchange, then such excess shall be considered as gain from the sale or exchange of the capital asset or property which is not a capital asset, as the case may be. Thus, if an individual transfers, under §351, property having a basis in his hands of $20,000, but subject to a mortgage of $50,000 to a corporation controlled by him, such individual will be subject to tax with respect to $30,000, the excess of the amount of the liability over the adjusted basis of the property in the hands of the transferor." (emphasis added)

It is submitted that the only logical conclusion with respect to the legislative history of 357(c) is that set forth in the decision of this Court in Easson.

B. Since the transaction in the case at bar does not involve tax avoidance, to apply Section 357(c) to cash basis taxpayers who transfer accounts receivable and accounts payable

will necessarily result in double taxation and will encourage distortions in the incorporation of a cash basis business - results which could not have been intended by Congress.

The avoidance of tax necessarily presupposes that the transferor has received some economic benefit. While the Tax Court ostensibly conceded that no economic benefit was realized by the Appellants, it held that it was bound to literally interpret the statute. However, it is well settled that the literal interpretation of a statute must necessarily be modified by a reasonable construction which will avoid unwarranted results. (See Mertens, Law of Federal Income Taxation, Section 3.04, Zimet Revision). As will be seen below, unless this Court distinguishes between the application of 357(c) to a cash basis taxpayer who transfers accounts receivable and accounts payable to a controlled corporation and the application thereof to a transferor on the accrual basis, such unwarranted results must necessarily follow.

It is clear that the doctrine which evolves from the mortgaged property cases applies equally to both cash basis and accrual basis taxpayers. In all of the cases decided to date under Section 357(c), namely, Arthur L. Kniffen, 39 T.C. 533 (1965); N.F. Testor v. Commissioner, 40 T.C. 273, aff'd, 327 Fed.2nd 788 (7th Cir. 1964) and, most recently, Peter W. DeFelice, 25 T.C.M. 835 (1966); the question of mortgages was not involved. However, in each of those cases, the transfer of an insolvent business was involved since in

each case the liabilities assumed by the transferee corporation exceeded the value of the assets transferred. Although the Commissioner is relying heavily on these cases in the case at bar, they are clearly distinguishable. In the cases cited, the Commissioner made no attempt to assign a basis other than book value to accounts receivable and accounts payable. There was no need for the Commissioner to attempt to do so, since in each case there was clear economic benefit to the transferor inasmuch as the liabilities assumed by the transferee exceeded not only the adjusted tax basis of the assets transferred, but also their fair market value. Further, in all three cases, the fair market value of the assets transferred was at least equal to the adjusted tax basis under the various taxpayers' method of accounting. Clearly, Section 357(c) was properly applied in each of the aforementioned cases in order to prevent tax avoidance. Unless a tax had been imposed at the time of the transfer then, under Section 358, the taxpayer's basis for the stock received from the corporation would have had to have been reduced below zero by the amount that the liabilities assumed exceeded the basis of the assets transferred. This is the "negative basis" concept discussed in Easson. In Easson, of course, this Court recognized that 357(c) solved the problem of the negative basis.

The cases relied on by the Commissioner are inapplicable to the instant case. The facts of this case can be simplified by assuming that the accounts receivable were the only assets

transferred and the accounts payable were the only liabilities assumed. The Commissioner, in his determination of deficiency assigned a zero basis to the accounts receivable, valued the accounts payable at their face amount and concluded that the accounts payable exceeded the adjusted basis of the accounts receivable and, therefore, Section 357(c) was applicable. The Commissioner's approach can be similarly applied to every cash basis taxpayer who transfers accounts receivable and accounts payable. Obviously, a cash basis taxpayer who transfers $100,000.00 of accounts receivable in exchange for the assumption of $50,000.00 of accounts payable and the receipt by him of stock valued at $50,000.00 has not been economically benefited nor has he received any money as a result of the transaction. It is a long recognized concept of tax law that the imposition of a tax presupposes the receipt of income and income under Section 61 of the Code necessarily requires that the taxpayer be benefited in an economic sense, or at least, be in an improved financial position. In Easson, the Tax Court stated:

> "It is a fundamental concept of income taxation to tax gain when its fruits are available for payment of the tax."(7)

Seemingly, the absence of economic benefit alone should be sufficient basis upon which to exclude Appellants' transfer from the impact of Section 357(c). However, when it is determined that Appellants did not economically benefit from the transaction, but in fact may suffer an economic detriment

---

(7) 33 T.C. 963, Note footnote 8 at p. 970 (1960)

then, it should be clear that Section 357(c) does not apply. Assume that the receivables transferred are $100,000.00 and the payables assumed by the corporation are $50,000.00 and that stock is issued for the net equity, or $50,000.00. The basis of the stock received by the taxpayer transferor in exchange for the assets and the assumption of the liabilities must be determined under Section 358(a), the basis of Appellants' stock would be the same as the basis of the property exchanged, i.e., zero.[8] However, this basis must be increased by the amount of the gain realized on the transfer, or $50,000.00. Under Section 358(d), the Appellants are then required to reduce their basis in the stock by the amount of

---

(8) Sec. 358(a) General Rule-- In the case of an exchange to which section 351, 354, 355, 356, 361, or 371(b) applies--

(1) Nonrecognition Property.-- The basis of the property permitted to be received under such section without the recognition of gain or loss shall be the same as that of the property exchanged--

(A) decreased by--

(i) the fair market value of any other property except money) received by the taxpayer,

(ii) the amount of any money received by the taxpayer, and

(iii) the amount of loss to the taxpayer which was recognized on such exchange, and

(B) increased by--

(i) the amount which was treated as a dividend, and

(ii) the amount of gain to the taxpayer which was recognized on such exchange (not including any portion of such gain which was treated as a dividend).

(2) Other property-- The basis of any other property (except money) received by the taxpayer shall be its fair market value.

the liabilities assumed by the corporation, or $50,000.00.[9] The result of this computation is that the tax basis of the stock is zero and, assuming the stock was sold for its book value, the taxpayer would realize a taxable gain of $50,000.00 upon the sale of the stock. Appellant, therefore, will eventually pay two taxes. The first tax has been imposed as a result of the application of 357(c) to the liabilities assumed at the time of incorporation. The second tax will be paid when the stock is sold as a result of the application of Section 358(d), resulting in a reduction of the basis of the stock by the amount of the liabilities assumed. It is inconceivable that Congress could have intended this result.

A literal application of the statute will also cause and encourage distortions in the incorporations of going businesses, which distortions could not have been intended by Congress when it enacted this section. These distortions can best be illustrated by examining three hypothetical situations. These examples assume that the sole assets and liabilities of the predecessor sole proprietorship transferred to the controlled corporation are accounts receivable and related accounts payable and that the transferor uses the cash method of accounting for reporting its income.

---

(9) Sec. 358(d) Assumption of Liability-- Where, as part of the consideration to the taxpayer, another party to the exchange assumed a liability of the taxpayer or acquired from the taxpayer property subject to a liability, such assumption or acquisition (in the amount of the liability) shall, for purposes of this section, be treated as money received by the taxpayer on the exchange.

1. The transferor could retain the accounts receivable, use the proceeds from the collection thereof to satisfy the accounts payable and any income taxes arising as a result of the collection of the receivables and thereafter transfer the net cash to the corporation. Obviously, this would be the most extreme example of distortion since it would be virtually impossible for a "going" business to incorporate on this basis since it would require that the business be suspended during the liquidation period. That Congress could not intend such a result was made clear when it enacted Section 112(k) of the 1939 Code.

2. He could, instead, transfer only the trade accounts receivable to his controlled corporation without any assumption of liabilities by the corporation. The incorporation itself would not be an income realizing event. The transferee corporation, regardless of its method of accounting, would be taxed on the accounts receivable when collected. P. A. Birren & Son v. C.I.R., 116 Fed.2nd 718 (7th Cir. 1940). The transferor, would be entitled to a deduction for the trade accounts payable when they were paid by him. Thus, the resulting distortion since the income generated by incurring the liabilities would be shifted to the transferee corporation while the benefit of the expense deductions would be retained by the transferor.

3. Alternatively, the transferor could retain the accounts receivable and transfer to the corporation only the

accounts payable. Under the rule of the Testor case, the transferor would apparently be taxable to the extent that the liabilities assumed by the corporation, since no assets were transferred. Section 357(c) would be applied and the transferor would pay a tax on the gain at that time. In addition, the transferor, being on the cash basis, would also be taxed upon the receivables when they were collected.

Although there are no reported cases, the Commissioner is now apparently attempting to prevent both the transferor and the transferee from deducting the accounts payable on the theory that the transferee may not deduct such payables since it did not incur the payables and the transferor may not deduct such payables, since it did not make the payment, and both must be present in order for a deduction to be allowed. Further, the Commissioner also is apparently attempting to tax the accounts receivable only to the transferee on the theory that he may not assign his income. Only where both the accounts payable and accounts receivable are transferred does it seem likely that the Commissioner's theories will be thwarted. However, the case at bar may effectively prevent the taxpayer from transferring both accounts receivable and accounts payable.

II.

ASSUMING SECTION 357(c) IS APPLICABLE TO THE INSTANT CASE, THEN THE TRADE ACCOUNTS RECEIVABLE MUST BE ASSIGNED A BASIS AT LEAST EQUAL TO THE AMOUNT OF THE TRADE ACCOUNTS PAYABLE ASSUMED BY THE CORPORATION.

The Tax Court found that "accounts receivable in the hands of a cash basis taxpayer have a basis of zero", citing P. A. Birren & Son, Inc. v. Commissioner, 116 Fed.2nd 718 (7th Cir. 1940). It is submitted that this finding was made without careful analysis of Appellants' argument with respect to the basis of accounts receivable. Appellants agree that, in theory, the accounts receivable of a cash basis taxpayer have a zero basis and that this proposition would yield the correct result in the usual situation where the taxability of the accounts receivable itself is in issue. This was the case in Birren. However, Appellants submit that the concept of a zero basis for accounts receivable while producing a satisfactory result in the Birren situation, has never been analyzed in terms of Section 357(c). Therefore, general principles of tax law should apply in determining the meaning of "adjusted basis" under this section.

In Birren, the Court made the following statement:

> "Birren, the transferor, had the benefit of deductions for the cost of his sales in his tax returns filed for previous years, and that under this method the full amount collected on the accounts receivable would have been income taxable as such to the transferor when received." (emphasis added)

The Court was there stating that since the taxpayer had deducted the accounts payable and had received a tax benefit from that deduction, he could not thereafter transfer the accounts receivable and expect to assign a basis to those receivables for the purpose of preventing them from being

taxed to the transferor when received. Here, both the accounts payable and the accounts receivable had been simultaneously transferred to the new corporation with the result that the ultimate taxability of the receivables and deductibility of the payables will lay with the transferee corporation. The Court in Birren recognized that the deduction of the accounts payable and the resulting tax benefit is inextricably wound up with the taxability of the accounts receivable. Thus, a cash basis taxpayer who buys goods on credit and then sells those goods on credit should receive a basis for the resulting accounts receivable until such time as he has received the benefit from the deduction of the accounts payable. Once this benefit is realized, then the accounts receivable can be assigned a zero basis. This argument definitely finds authority in Code Section 1012 and the regulations thereunder. Section 1012 provides that the basis of property shall be the cost of such property. Treasury regulations, Section 1.1012-1(a) state that cost is the amount paid for such property in cash or other property. Therefore, it is clear that the concept of cost is to be applied when determining the basis of property. It is also clear that in the ordinary course of a business operation, the cost of generating trade accounts receivable necessarily includes the cost of related trade accounts payable. This concept goes to the very nature of the credit system of business enterprises. The Court below misconstrued Appellants' argument in this regard as depending

on the proposition that the accounts receivable transferred to the corporation by Appellants were encumbered by liens which were in the amount of the accounts payable so transferred. The Court then ostensibly concluded that the Appellants' "lien theory" was not supported by facts, and that the argument had no merit. It is submitted to this Court that the proposition that trade accounts payable are the cost of generating trade accounts receivable is not dependent upon whether or not the receivables were a lien on the payables, but it is a logical business fact which fits squarely within the provisions of Section 1012.

The cases cited by the lower Court in support of the proposition that the receivables should be assigned a zero basis were decided on the theory of the Birren case and were decided with a view towards eliminating any tax avoidance which might result from the transfer of cash basis accounts receivable in reorganizations.(10) These cases generally follow the theory of Code Section 362(a), that in a 351 exchange the basis of property in the hands of the transferor carries over to the transferee. Had Congress contemplated the problems arising from the cash basis incorporation and, specifically, the problem here, then it could have easily resolved the question by a cross reference in Section 357(c) to Section 362. Such a cross reference would have been uncontroverted evidence that "adjusted basis" under Section 357(c) was to be construed as having the same

(10) See Tax Court Decision, p. 15.

meaning as "basis" under Section 362(a). There is no such reference either in Code Section 357 or the regulations thereunder, to Code Section 362. Therefore, it is incumbent upon this Court to judicially construe the term "adjusted basis" found in 357(c) in light of the legislative and judicial history of Section 357 and in light of the unwarranted results which follow from its application to cash basis taxpayers. It is clear that the Tax Court erred in concluding that the language of Section 357(c) is "clear and unambiguous". To the contrary, the meaning of "adjusted basis" is obviously open to judicial construction. Appellants submit that the concept of a zero basis for cash basis accounts receivable has no application under Section 357 where the question is only whether or not the transfer of cash basis accounts receivable with a value in excess of related accounts payable should give rise to a taxable event. In this context, it is clear that the Birren case is authority for assigning the receivables a basis equal to the amount of the payables and the meaning of "adjusted basis" under Section 357(c) should be so construed by this Court.

III.

IF, UNDER THE CASH METHOD OF ACCOUNTING, A ZERO BASIS MUST BE ASSIGNED TO ACCOUNTS RECEIVABLE, THEN IT MUST FOLLOW THAT A CASH BASIS TAXPAYER'S ACCOUNTS PAYABLE ARE NOT "LIABILITIES" WITHIN THE MEANING OF SECTION 357(c).

The Tax Court's refusal to assign a tax basis to the

accounts receivable equal in amount to the accounts payable results in a tax balance sheet which could not have been intended under Section 357(c). The Tax Court's and the Commissioner's balance sheet for Appellants is as follows:

ASSETS	
Cash	$ 1,045.40
Accounts Receivable	1,833.97
Prepaid Rent	125.00
Equipment	8,247.36
TOTAL ASSETS	$11,251.73
LIABILITIES & NET WORTH	
Accounts Payable (assumed)	$37,719.78
Notes Payable (assumed)	8,273.03
TOTAL LIABILITIES	$45,992.81
DEFICIT	(36,741.08)
TOTAL LIABILITIES & NET WORTH	$11,251.73

By no stretch of the imagination is the above statement of financial position correct or in accordance with generally accepted tax and accounting principles. Appellants' business was not insolvent. The accounting balance sheet would properly reflect both the accounts receivable and the accounts payable. It was on the basis of the accounting balance sheet that Appellants received stock and a note, valued at approximately $41,000.00, in exchange for the business. The tax balance sheet necessarily must depend on the taxpayer's method of accounting. For tax purposes, accounts receivable are not recognized until collected and accounts payable are not recognized until paid. Treasury Regulations Section 1.446-1(c)(1)(i) provide that:

> "Generally, under the cash receipts and disbursements method in the computation of taxable income, all items which constitute gross income...are to be included for the taxable year in which actually or constructively received. Expenditures are to be deducted for the taxable year in which actually made."

If the Tax Court and the Commissioner are to be sustained in their theory that the accounts receivable must be assigned a zero basis under the Appellants' method of accounting, then it must necessarily follow that this theory should be applied consistently to both sides of the balance sheet. That is, if the term "adjusted basis" is to be construed strictly in a tax accounting sense then, the term "liabilities" must also be construed in a tax accounting sense. In a tax accounting sense, accounts payable are not liabilities to a cash basis taxpayer. Hence, the only proper tax balance sheet would be one which omits both accounts receivable and accounts payable. This construction would be entirely consistent with the legislative and judicial history of the code section.

It is clear that in order to avoid the inequities to the cash basis taxpayer with respect to his transfer of accounts receivable and accounts payable, Section 357(c) can only be interpreted as applying to the transfer of accounts receivable and accounts payable by an accrual basis taxpayer. Only when applied to the accrual basis taxpayer, do these terms have clear meaning. In any event, it is illogical to interpret the code section as applying in one manner to accounts receivable and as applying in a totally different

manner to accounts payable. The only consistent approach is to either construe "adjusted basis" in a pure accounting sense which would result in assigning a basis to accounts receivable on the theory that they have a cost, i.e., the amount of the related accounts payable and to therefore treat the accounts payable as a liability under Section 357(c); or, to properly treat both in a tax sense as having no existence to the cash basis taxpayer until that moment in time when they are collected or paid.

IV.

IN CASES OF DOUBT, STATUTE, OR INTERPRETED OR RESOLVED MOST STRONGLY AGAINST THE GOVERNMENT AND IN FAVOR OF THE TAXPAYER.

If doubt exists as to whether or not 357(c) should be applied to the facts in this case, such doubts should be resolved in the favor of taxpayer. This is a well-established rule of statutory construction and if a doubt exists as to whether or not the transfer of accounts receivable and accounts payable by a cash basis taxpayer under Section 351 comes within the purview of Section 357(c), such doubt should be resolved in favor of the taxpayer. In Gould v. Gould, 245 U.S. 151 (1917) the Court there stated:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen. Accord: Charles Leich & Co. v. United States, C. A. 7 (1954) 210 F. 2d 901, 907."

CONCLUSION

For the reasons herein stated, it is respectfully submitted that this Court should reverse the U. S. Tax Court decision, and that the cause be remanded to the United States Tax Court with directions to the parties hereto to submit computations under Rule 50 of the Tax Court in accordance with the decision of this Court.

All of which is respectfully submitted,

CLARENCE J. FERRARI, JR.

Attorney for Petitioners-Appellants

July 29, 1967

NO. 21538

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD R. TARANTINO,

Appellant,

vs.

SGT. J. EGGER and OFFICER J. MOURNING,

Appellees.

BRIEF FOR APPELLEES

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

DANIEL L. DINTZER and
ROBERT VALLIER

453 South Spring Street
Los Angeles, California 90013

Attorneys for Appellees

NO. 21538

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD R. TARANTINO,

Appellant,

vs.

SGT. J. EGGER and OFFICER
J. MOURNING,

Appellees.

BRIEF FOR APPELLEES

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

DANIEL L. DINTZER and
ROBERT VALLIER

453 South Spring Street
Los Angeles, California 90013

Attorneys for Appellees

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 21538

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD R. TARANTINO,

Appellant,

vs.

SGT. J. EGGER and OFFICER J. MOURNING,

Appellees.

BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered on October 13, 1966 by the United States District Court, Southern District of California, Central Division, granting summary judgment and costs to defendants (Appellees herein), J. F. Egger and J. R. Mourning (sued below as Sgt. J. Egger and Officer J. Mourning). The underlying action was brought by Edward R. Tarantino, by a complaint that was filed on May 17, 1966 in the U. S. District Court, Southern District of California. Said complaint asked that the United States District Court invoke its jurisdiction pursuant to Title 28, U. S. C., Section 1331 and Section 1343(1), (2), (3), and (4), and "VICINAL" Jurisdiction under Title 28, U. S. C., Section

1392, and sought relief under a civil rights action pursuant to Title 42, U.S.C., Sections 1983 and 1985 (C.T. p. 2). The District Court's order of October 13, 1966, certified that it was the opinion of that court that "that defendants J. R. Mourning and J.F. Egger had reasonable and probable cause to arrest and detain the plaintiff, and that the arrest and detention of plaintiff was legally proper, and that the retention by the police department of approximately $10,000.00 found hidden in plaintiff's automobile was legally and properly booked into the Beverly Hills Police Department as evidence and that defendants J. R. Mourning and J. F. Egger did not under color of any statute, ordinance, regulation, custom, or usage of any state or territories subject or cause to be subjected on the plaintiff, Edward R. Tarantino, through the deprivation of any rights, privileges or immunities secured by the Constitution and laws of this nation, and that J. R. Mourning and J. F. Egger did not conspire to interfere with the civil rights of the plaintiff, Edward R. Tarantino and that the defendants J. R. Mourning and J. F. Egger were entitled to summary judgment and costs therein." (C.T. p. 57). The appellant, Edward R. Tarantino, on November 29, 1966, filed in this Court a timely application for appeal, which was granted on January 13, 1967. This Court's jurisdiction accordingly rests upon Title 28, U.S.C. Sections 1291 and 1215.

STATEMENT OF THE CASE

Appellant filed his civil rights complaint on May 17, 1966 (C. T. p. 2).

Appellant filed a "Motion to Institute Declaratory Judgment" under Title 28, U. S. C., Section 2201, on July 22, 1966 (C. T. p. 28). Appellees filed an answer to the latter motion on July 26, 1966 (C. T. p. 32). Appellees filed an answer to appellant's complaint on July 27, 1966 (C. T. pp. 35-37). On October 4, 1966, appellees filed a substitution of attorneys, and a Notice of Motion and Motion for Summary Judgment, along with a Statement of Reasons and Points and Authorities and Affidavits thereon, the proposed Summary Judgment and proposed Findings of Fact and Conclusions of Law (C. T. pp. 47-60).

On October 13, 1966, Summary Judgement was granted to appellees (C. T. p. 60). Appellant filed a Motion for Rehearing on November 2, 1966, which was denied on November 21, 1966 (C. T. p. 83). Appellant's Motion for Leave to Appeal in Forma Pauperis was denied by order of December 6, 1966. On January 13, 1967, this Court made its order granting appellant leave to appeal in Forma Pauperis against defendants Egger and Mourning.

STATEMENT OF FACTS

Appellees, at all times mentioned herein, were and are duly qualified and acting police officers of the City of Beverly Hills, County of Los Angeles, State of California, and were at all times

mentioned in appellant's complaint engaged in the performance of their regular assigned duties as such police officers of said city. Upon reliable information and statements and sworn statements given by witnesses, victims and others criminally involved with the appellant herein, it was determined by appellees, and reasonably suspected by them, that appellant was a member of a certain robbery gang operating in the Los Angeles area and responsible for several crimes in the City of Beverly Hills, California, including an armed robbery of certain civilians named Herbert Kronish and Hazel Kronish, located at 9201 Wilshire Boulevard, Beverly Hills, California.

Appellees, as arresting officers, developed information that the appellant was one of the persons responsible for a robbery which was committed on August 11, 1964 at the residence of Herbert Kronish and Hazel Kronish. Appellees proceeded to the appellant's residence, which was located in Los Angeles, where he was contacted and placed under arrest. Numerous items which were proved to have been taken during the "Kronish robbery" were recovered at the suspect's residence. Appellees were assisted in their arrest by two Los Angeles Police Department radio car officers. (All of the above facts are asserted in appellees' affidavits filed in support of their Motion for Summary Judgment, C.T. p. 51 and p. 53.)

QUESTIONS PRESENTED

Whether the District Court erred in granting appellees' Motion for Summary Judgment and Costs thereon (C. T. p. 60).

SUMMARY OF ARGUMENT

I

THE DISTRICT COURT DID NOT ERR IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT AND COSTS THEREON.

The District Court clearly did not err in granting appellees' Motion for Summary Judgment herein. The function of a Motion for Summary Judgment is to dispose of cases where there is no genuine issue as to material facts. Rogers v. Girad Trust Co., 159 F. 2d 239 (6th Cir. 1947).

Even assuming that every fact as alleged by appellant is true, appellant has still failed to recite any activities on the part of appellees which were at all unlawful or infringed upon his constitutional rights.

It is appellees' duty as police officers to investigate crimes, gather information and evidence, and proceed to make arrests of suspects when the evidence so gathered leads them to believe that there is reasonable and probable cause for such an arrest.

In the instant case, appellees had positive identification made of appellant as a burglar and robber prior to appellant's arrest.

The only real question raised by appellant's pleadings, is whether appellees being members of the Beverly Hills Police Department, had jurisdiction and authority to make the arrest of appellant in the City of Los Angeles. If said arrest was legal, then the search and seizure that followed would necessarily also be legal.

Appellant, in his complaint, has sought various types of relief. He has questioned the validity of his present confinement in prison. He has attempted to use this federal civil proceeding to raise questions which properly should have been brought up on appeal from his California state criminal conviction or by writ of habeas corpus or corum nobis, but certainly not by the instant action. The only real issue before the Federal Court herein (even assuming the appellant's own factual interpretation of what occurred), would be, as is set forth in appellant's opening brief, page 7, line 8, i.e., - whether appellees acted in excess of their jurisdiction and authority in arresting appellant in the City of Los Angeles.

Nowhere does appellant controvert the fact that appellees had gathered sufficient evidence to constitute reasonable and probable cause to believe that appellant had committed a felony. Under California Penal Code, Section 836(2), a peace officer may make an arrest in obedience to a warrant, or may, without a warrant, arrest a person:

" . . .

(2) When a person arrested has committed a felony

although not in his presence.

(3) Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed." (Emphasis added).

Again, appellant does not refute appellees' contention that they made his arrest in cooperation with members of the Los Angeles Police Department. Under California Penal Code, Section 817, the authority of a peace officer extends to any place in the state,

"(a) as to a public offense committed or which there is probable cause to believe has been committed within the political subdivision that employs him, or

(b) if he has the prior consent of the chief of police or person authorized to give such consent if the place is within a city or the sheriff or person authorized by him to give such consent if the place is within a county." (Emphasis added).

Therefore, it is clear that appellees, by making the subject arrest in cooperation with members of the Los Angeles Police Department were acting within the guidelines of Penal Code, Section 817(b). However, even assuming that appellees had acted alone, without the aid of members of the Los Angeles Police Department, the arrest would still have been clearly appropriate. As the court in People v. McCarty, 164 Cal. App. 2d 322, 330 P. 2d 484, at p. 328,

stated:

> "We find no merit in defendant's contentions that his arrest in Los Angeles by a police officer from Ventura County was unlawful, because the officer was without a warrant . . . the authority of an arresting officer in the instant case cannot be denied. It is undisputed that he was a peace officer (Penal Code, Section 817) and as such, had authority under Penal Code, Section 836(3) to make the arrest without a warrant if a felony had in fact been committed, and he had reasonable cause to believe that defendant had committed it. These conditions were fulfilled; the actual commission of a felony is unquestioned, and the victim had made a positive identification of the defendant as the perpetrator in the presence of the officers only a few hours before the arrest was made. Under these circumstances, a private person could have made this arrest without a warrant (Penal Code, Section 837(3)). It would appear anomalous to hold unlawful an arrest by a peace officer when the same arrest by a private citizen clearly would have been lawful (People v. Ball, 162 Cal. App. 2d 465, 468, 328 P. 2d 276)."

The courts of California have uniformly held that a police officer's power of arrest, when acting beyond the limits of the

geographical unit by which he is appointed becomes that which is conferred upon a private citizen in the same circumstances.

People v. Martin, 225 Cal. App. 2d 91,
36 Cal. Rptr. 924;
People v. Alvarado, 208 Cal. App. 2d 629,
25 Cal. Rptr. 437;
People v. Rodger, 241 A. C. A. 478,
50 Cal. Rptr. 559, and see also
5 Am. Jur. 2d Arrest, §50.

It is clear from the uncontroverted facts that appellees knew that a felony had been committed. A significant amount of evidence had been compiled to link the appellant to the commission of said felony. Said evidence included statements of victims and statements of other perpetrators of said felony. Under California Penal Code, Section 837, a private person may arrest another:

> " . . . (3) When a felony has been in fact committed, and he has reasonable cause to believe the person arrested has committed it."

There can be no argument that the search which immediately followed the arrest was also legal. As the court in People v. Alvarado, supra, stated:

> "We assume, without deciding that a LosAngeles police officer lacks authority of a peace officer to make an arrest under Penal Code, Section 836,

> when he is outside the city limits unless he is engaged in fresh pursuit or is executing a warrant authorizing such an arrest. (See 8 Opinions California Attorney General 149). An arrest by a city policeman outside his territorial jurisdiction is unquestionably valid if made upon grounds which would authorize a lawful arrest by a private citizen. (People v. Burgess, 170 Cal. App. 2d 36, 40, 338 P. 2d 524, People v. McCarty, 164 Cal. App. 2d 322, 328, 330 P. 2d 484)."

And the court goes on at page 632:

> " . . . If the arrest was lawful, the search was justified as an incident of the arrest, the premises searched being immediately adjacent to the place of arrest and under appellant's control. (People v. Dixon, 46 Cal. 2d 456, 459, 296 P. 2d 557)."

In light of the above cases, there can be no question as to the validity of the arrest made by appellees and the search which was made as an incident thereto, and as a careful reading of appellant's contentions will indicate, no other factual or legal issues exist which should have deterred the District Court from granting the Motion for Summary Judgment.

The instant case is quite similar to the case of Morgan v. Sylvester, 125 F. Supp. 380 (S. D. New York, 1954). Therein,

plaintiff set forth a claim under the Civil Rights Act, and the court stated:

> "This action is a clear attempt, despite plaintiff's assertion to the contrary to obtain a review and a retrial of the state court proceedings. The fact that a defeated litigant is prepared to charge a 'conspiracy' recklessly or otherwise and recite in haec verba the language of the Civil Rights Act does not give a right of review in the federal courts. To uphold the claim here advanced upon such conclusionary allegations, ' would open the door wide to every aggrieved litigant in a state court proceedings and set the federal courts up as arbitrator of the correctness of every state decision."

And the court goes on at page 388:

> " . . . a litigant appearing pro se acquires no greater right than any other litigant and such appearance may not be used to deprive defendants of the same rights enjoyed by other defendants."

And further at page 389:

> " . . . a party moving for summary judgment bears the burden of showing the absence of any genuine issue of fact requiring a trial. Thereupon, the opposing party must offer contravailing evidence that such an issue does exist (See Radio City Music Hall Corp. v. U. S., 135 F. 2d 715

(2 Cir. 1943)). And, of course, if it is present, the court may not grant summary judgment. However, Rule 56 of the Federal Rules of Civil Procedure has not been rendered so sterile (Millstein v. Leland Hayward, Inc. (D.C.), 10 F.D.R. 198, 199) that a trial must be granted upon a claim which the papers show has no basis in fact. 'The rule should not be used by the court for the trial of disputed questions of fact upon affidavits, but when it is invoked by either party to a case and a showing is made by the movant, the burden rests on the opposite party to show that he has a ground of defense fairly arguable and of a substantial character.' (See Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co., 137 F.2d 871, 877 (6 Cir. 1943). "

The Morgan case clearly sets forth the appellees' position in the case at bar. Appellant has attempted to use this forum to subvert the findings of the State Court. He has made conclusionary allegations and has recited language from the Civil Rights Act, and the United States Constitution to attempt to uphold his claim. However, the only real issue raised was in fact the legal issue as to whether a police officer could make an arrest outside his jurisdiction. Appellees submit that the law clearly upholds their actions in this regard.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's order granting appellees' Motion for Summary Judgment be affirmed.

Respectfully submitted,

DANIEL L. DINTZER and

ROBERT VALLIER

Attorneys for Appellees

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Daniel L. Dintzer

DANIEL L. DINTZER

NO. 21539

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN RALPH RINZUELLA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
ROBERT M. TALCOTT,
Assistant U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

NO. 21539

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN RALPH RINZUELLA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
ROBERT M. TALCOTT,
Assistant U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

NO. 21539

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN RALPH RINZUELLA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTION AND STATEMENT OF THE CASE

A. PRE-TRIAL AND TRIAL PROCEEDINGS

On June 23, 1965, the Federal Grand Jury for the Southern District of California returned indictment No. 35045 charging appellant in a single count with violation of Title 18, United States Code, Section 2312 - Interstate Transportation of a stolen motor vehicle [C. T. p. 2]. 1/

1/ "C. T." refers to Clerk's Transcript of record.

On June 28, 1965, appellant was arraigned in the United States District Court, at which time an attorney was appointed by the Court to represent the appellant. On the same date appellant entered a plea of not guilty to the charge set forth in the indictment, and the matter was continued to July 19, 1965 for trial setting [C. T. p. 3].

On July 19, 1965, the appellant informed the District Court that he was attempting to employ counsel of his own choice. The Court therefore continued the matter to July 26, 1965 for further proceedings and trial setting [C. T. p. 4].

On July 26, 1965, the case was set for trial on August 31, 1965. On August 31, 1965, jury trial commenced before Honorable Jesse W. Curtis. The appellant was granted permission by the Court to act in pro per with the assistance of appointed counsel. At this time appellant moved the trial court to dismiss the charges for lack of speedy prosecution. The Court denied the motion.

On September 1, 1965, the appellant was found guilty and was sentenced on the same date to the custody of the Attorney General for a period of five years [C. T. pp. 29-31].

On September 7, 1965, appellant filed a timely notice of appeal [C. T. p. 39].

B. POST TRIAL PROCEEDINGS

On November 30, 1965, appellant moved for a reduction of sentence which was denied by the Court [C. T. pp. 41-43].

On December 1, 1965, appellant through counsel moved the trial court for a new trial based on the grounds of newly discovered evidence [C. T. 43-45]. On December 13, 1965 on Motion of appellant's attorney, Motion for New Trial was taken off calendar [C. T. 46].

On December 23, 1965, appellant's counsel renewed the earlier motion for a new trial on the grounds of newly discovered evidence [C. T. p. 57].

On January 3, 1966, a hearing was held on the motion for a new trial and denied by the District Court [C. T. p. 58].

The District Court had jurisdiction to try the case under Title 18, United States Code, Section 2312. This Court has jurisdiction to entertain this appeal pursuant to the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTORY PROVISION

Title 18, United States Code, provides in pertinent part:

> "Whoever transports in interstate . . . commerce a motor vehicle . . . knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

III

STATEMENT OF FACTS

The defendant was charged in a one count indictment with transporting a 1964 Ford Motor Vehicle in interstate commerce from Lynn, Massachusetts, to Los Angeles County, California, knowing said vehicle to have been stolen.

Donald Warrington was the first witness called by the appellee. Mr. Warrington testified that on April 4, 1964, he was the night manager of a Mobil Gas Station in Lynn, Massachusetts, which also rented cars. At approximately 11:30 P.M., on April 4, 1964, the defendant entered the gas station and had a conversation with the witness. Mr. Warrington stated the defendant wanted to rent a car to go to New Jersey as his own vehicle had broken down in Gloucester, Massachusetts, where he left his wife and family. Mr. Warrington testified that when he told the defendant what the deposit would be the defendant replied that with the payment of the deposit he would not have enough money remaining to pay for the gas. Therefore, the witness testified he suggested to the defendant that he rent the car on a weekend special whereby he could drive his family to Boston and put them on the train [R. T. pp. 73-76].[2/]

Mr. Warrington was then shown Government Exhibit #2, a Hertz-Rent-A-Car Contract. Mr. Warrington testified that the defendant had identified himself as John Russo [R. T. p. 77, lines

---

2/ "R. T." refers to Reporter's Transcript of record.

11-12], which name appeared on the rental agreement. That all of the other information on the rental agreement was provided him by the defendant or was copied from a driver's license furnished by defendant. This information included the number on the driver's license, the name John Russo on the driver's license and the street address, 929 Washington Street, Hoboken, New Jersey [R. T. p. 78, lines 11-25; p. 80, lines 1-3]. The agreement also reflected that the car was rented for a period of only two days and was to be returned on April 6, 1964 [R. T. p. 97, line 1].

A 1964 Ford was then delivered to the defendant. A registration to a 1964 Ford, Government Exhibit #1, had already been identified as reflecting the registration to the vehicle rented defendant, and admitted into evidence [R. T. p. 73, lines 17-25; p. 74, lines 1-3].

Mr. Warrington concluded his direct testimony by stating that when the car was not returned he attempted to contact the defendant at the street address reflected on the agreement and copied from the driver's license presented by defendant, but was unsuccessful as defendant was not known at that address [R. T. p. 79, lines 7-21]. Mr. Warrington further stated he attempted to locate the defendant from information on a business card furnished him by defendant reflecting defendant's association with a finance company. This attempt was also unsuccessful as the company had never heard of a John Russo [R. T. p. 79, lines 22-25; p. 80, lines 1-13; p. 81, lines 9-22].

On cross-examination Mr. Warrington testified that he was

responsible for the Hertz Rent-A-Car business during the evening hours and that he handled phone calls received pertaining thereto [R. T. p. 82, lines 24-25]. Mr. Warrington denied receiving a long distance phone call from the defendant on April 6 or 7th, 1964, from Danbury, Connecticut. Mr. Warrington stated that he usually had Mondays off and if a call relating to a rented car was received, it would be noted on the contract by his Monday night replacement [R. T. p. 84, lines 6-25]. Warrington testified that because the car was supposed to be returned on Monday, April 6, 1964, his day off, and was not received, he consulted his replacement on his return and the replacement informed him that he had not received any phone call relating to the car or heard from any customer [R. T. p. 89, lines 2-12].

On redirect examination, Mr. Warrington testified that it was the usual business practice to make a notation on the rental agreement of any change in the contract [R. T. p. 91, lines 17-25]. He further testified that when defendant first said he wanted to go to New Jersey, Mr. Warrington wrote down Jersey City, New Jersey, as the turn-in point; then when defendant said that he did not have enough money, Mr. Warrington crossed out Jersey City [R. T. p. 92, lines 10-19].

Mr. Warrington also testified that according to the rental agreement the car was to be returned on April 6, 1964 [R. T. p. 97, lines 1-2], that the car was maroon with a black interior [R. T. p. 102, lines 11-13], and that the maroon color was dark, at times looking almost black [R. T. p. 105, lines 11-12]. Mr.

Warrington further testified that Government's Exhibit No. 1, registration for a vehicle, was the registration for the vehicle rented to defendant.

Appellee's second witness was Emily G. Emery, who testified that she lived at 929 Washington Street, Hoboken, New Jersey, the address on the driver's license shown to Mr. Warrington on the night the car was rented [R. T. pp. 78-79], and that she has lived there and owned the house 25 years [R. T. p. 106, lines 15-25]. Mrs. Emery then testified that defendant did not live at that address and never has, that no one named John Russo or John Rinzuella had ever lived there, and that she had never before seen the defendant [R. T. p. 107, lines 9-22].

The Government next called Mrs. June Strelecki. Mrs. Strelecki testified that these were photographs she had brought with her of an IBM tape recording of two expired New Jersey licenses issued to a John Rinzuella of Hoboken, New Jersey. The licenses had expired in June, 1963. Exhibits 3 and 4 were then admitted into evidence.

The Government's fourth witness was Mr. John Chavez. Mr. Chavez testified that he knew the defendant in Los Angeles, California, as John Russo, and that defendant had worked for him until approximately a month prior to defendant's arrest [R. T. p. 115, lines 1-16]. Mr. Chavez further testified that he had met defendant in 1963 or 1964 in Los Angeles and that defendant had a black Ford at that time [R. T. p. 115, lines 7, 8, 19-24]. Defendant at that time had told Mr. Chavez that he was making payments on

the car [R. T. p. 116, lines 18-20].

On cross-examination, Mr. Chavez testified that defendant's car did not have California license plates, but that the license plates were either New Jersey or Massachusetts [R. T. p. 119, lines 9-15].

Mr. Chavez was then called as a defense witness, and testified that one day defendant no longer had the car; Mr. Chavez could not recall when this occurred. At the time, defendant told Mr. Chavez that defendant and his wife had separated and that she had left with the car [R. T. p. 122, lines 6-20]. Mr. Chavez testified that the defendant seemed to be upset about this occurrence [R. T. p. 123, lines 7-10].

The Government then called Miss Bernardine Blacic as its fifth witness. Miss Blacic testified that she was acquainted with the defendant in Los Angeles, California as John Russo in June, 1964, and that he had at that time a new black Ford with red interior and Massachusetts license plates [R. T. pp. 125-26]. Miss Blacic testified she had seen defendant's car when he came to her home in Redondo Beach, California [R. T. p. 131, lines 16-20].

Miss Blacic was then called as a defense witness. She testified that a week or two after she saw defendant's car, defendant called her and asked for a ride because he had no car, and he seemed very upset [R. T. p. 129, lines 7-25]. She further testified that when she picked him up, defendant told her that his wife Tracy had left him and had taken the car [R. T. p. 130, lines 9-16]. Defendant appeared to be shocked by Tracy's leaving [R. T. p. 131,

lines 1-4].

The Government's sixth witness was Special Agent James N. Ryan, of the Federal Bureau of Investigation. Agent Ryan testified that on July 21, 1964, he examined a car at the Los Angeles Police Department. It was a 1964 black Ford Galaxie 500 with red interior, bearing Massachusetts license number L46494 and serial number 4E64C112468. Agent Ryan was shown Exhibits 1 and 2 (the Massachusetts registration and the rental agreement), and he stated that the car he examined was the same car as was identified in both Exhibits [R. T. p. 134, lines 1-13].

On cross-examination, Agent Ryan testified that he was told by the Los Angeles Police Department that the car had been abandoned on a street in Hollywood, California on approximately July 20, 1964 [R. T. p. 135, lines 8-10; p. 137, lines 13-20]. He further testified that Hertz employees had already cleaned the car when he examined it, so that nothing in the way of papers of any evidentiary value was obtained from the car [R. T. p. 137, lines 5-8].

The Government's seventh and final witness was Special Agent Thomas H. Thornton of the Federal Bureau of Investigation. Agent Thornton testified that he interviewed defendant at the Santa Barbara Police Department on June 10, 1965, in the presence of Special Agent Riley L. Millard of the Federal Bureau of Investigation [R. T. p. 138, lines 16-24]. After advising defendant of his rights to remain silent, to have counsel, and to have counsel appointed by the Court, Agent Thornton told defendant that a federal

complaint against him was outstanding in Los Angeles, alleging interstate transportation of stolen motor vehicle from Lynn, Massachusetts, to Los Angeles, California [R. T. p. 139]. Agent Thornton further testified that during this interview, defendant admitted renting the car under the name John Russo [R. T. p. 140, lines 6-9]. Defendant told Thornton that he had gotten the car to look for work in Gloucester, Massachusetts, but failing to find work there, he had decided two days later to leave Massachusetts [R. T. p. 140, lines 10-16].

Defendant then told Thornton that he had called the Hertz office in Lynn, Massachusetts, and requested a two-day extension on the car rental. Defendant stated that he made this request because he thought two days would be sufficient time for him to leave Massachusetts without being caught [R. T. p. 140, line 17 to p. 141, line 1]. Defendant further stated that he had driven the car through several states [R. T. p. 141, lines 2-6]. On cross-examination, Agent Thornton testified that defendant refused to sign any written statement [R. T. p. 145, lines 17-22].

The Government then rested [R. T. p. 148, line 17]. Defense motions for acquittal on the grounds that the Government had failed to establish the corpus delecti were denied [R. T. pp. 148-151].

The defense then called its first witness, Terrence L. Hofmann. Mr. Hofmann testified that he knew defendant in Los Angeles, California as John Russo both socially and in business, having worked under defendant [R. T. pp. 152-153]. He further

testified that in May or June of 1964 defendant had a dark maroon Ford, which he had seen twice, at least on one occasion, parked in front of the witnesses' house in Hermosa Beach, California [R. T. p. 153, lines 13-20]. The car did not have California license plates [R. T. p. 154, lines 2-4]. Mr. Hofmann also testified that he had learned from defendant about his wife's having left with the car and the children, and that defendant was unhappy about it [R. T. p. 154, lines 5-23]. Finally, Mr. Hofmann testified that he had not seen the car, defendant's wife or the children after that time [R. T. p. 155, lines 2-4 and 21-23].

As its second witness, the defense called Mrs. Emily G. Emery, of Hoboken, New Jersey, who had previously testified for the Government. Mrs. Emery testified that she had never before seen defendant [R. T. p. 157, lines 21-24], but that she knew a Tracy Hudson. Tracy Hudson had lived on River Street in Hoboken, New Jersey; she had two small children, an infant and a two-year old; this had been two years ago; and Tracy Hudson had worked for Mrs. Emery and had known Mrs. Emery's home address, 929 Washington Street, Hoboken, New Jersey [R. T. pp. 158-159].

The defense then called as its third and final witness John Rinzuella, the defendant. The defendant testified that he had been convicted of a felony in New Jersey and had been put on parole in 1962 [R. T. pp. 160-167]. He left New Jersey in March, 1964, with Tracy Hudson (Tracy Russo) and her two children, in violation of parole [R. T. p. 162]. He decided to leave in order to avoid mingling with "people of ill repute or ex-convicts" [R. T. p. 164,

lines 1-5]. From New Jersey, defendant went to Massachusetts [R. T. p. 164, lines 6-9]. Defendant had difficulty finding work in Massachusetts [R. T. pp. 164-167], and then decided to get a rented car [R. T. p. 167, lines 14-15]. Defendant testified that he rented the car from Mr. Warrington in Lynn, Massachusetts, using the name John Russo because he had no identification under his real name [R. T. pp. 169-170]. He used a driver's license given to him by Tracy Hudson, and admitted knowing that the license was not genuine [R. T. p. 170, lines 9-25]. Defendant denied having told Mr. Warrington that his car had broken down [R. T. p. 173, lines 18-23].

Defendant then related his subsequent travels in the Hertz car with Tracy Hudson and the children. The morning after the car was rented they went to Bangor, Maine [R. T. p. 174]; from there to Portsmouth, New Hampshire [R. T. p. 175]; and then to Danbury, Connecticut [R. T. pp. 175-176]. Defendant testified that while in Danbury he called the Hertz agency in Lynn, Massachusetts, from a pay phone in a supermarket, sometime within 72 hours after having rented the car. He testified that during this call he requested a 10-day extension, and was told that he could have the extension and could drop off the car at any Hertz office [R. T. pp. 176-179].

After the phone call, defendant testified, they drove to Aurora, Illinois [R. T. pp. 179-180], and to Kansas City [R. T. pp. 180-181]. From Kansas City, they drove to Carmel, California [R. T. p. 184], and finally to Los Angeles, California [R. T. p. 186, lines 1-5]. Defendant ended his travels with the car in Inglewood,

California, at the end of May, 1964 [R. T. p. 186, lines 13-25].

During all of these travels, defendant testified that they had used major freeways [R. T. p. 185, lines 1-7], had registered in motels under the name John Russo [R. T. p. 183, lines 3-7], and had done nothing to disguise the car [R. T. p. 182, lines 10-14].

After arriving in Inglewood, defendant got a job working for Mr. Chavez, and worked for 14 months [R. T. p. 187, lines 4-24]. Then, one morning, about two months after renting the car, defendant woke up about 7:00 in the morning to find that Tracy, the children, their luggage, and the car were gone [R. T. p. 192]. But he did not report the car as stolen because of his parole violation [R. T. p. 194, lines 17-23]. In all this time he had never sent Hertz a forwarding address or any money [R. T. p. 195, lines 14-18]. Defendant testified that the car was black with maroon interior [R. T. p. 196, lines 23-24].

Defendant then testified that he had arrived in Los Angeles about June 10, 1964, and that Tracy took the car about June 23, 1964 [R. T. p. 206]. He testified that he had not turned the car in to Hertz because he needed it for his job and did not have enough money to pay what was due [R. T. p. 207, lines 1-9]. He further testified that after the car disappeared, he bought a new Corvair and made payments on it. However the Corvair was subsequently repossessed because of his lack of credit [R. T. pp. 213-214].

On cross-examination, defendant admitted knowingly giving a false address to the Hertz agency in Massachusetts [R. T. p. 223, lines 7-10]. For the first time during his testimony defendant

claimed to have called Hertz in Kansas City to ask about keeping a car longer than the rental period on the contract; defendant claims to have been told that he could turn in the car at any office and simply pay the appropriate charges [R. T. p. 244].

On redirect, defendant testified in explanation of his nervous demeanor on cross-examination that he had recently had an operation, had lost 25 pounds, and was in constant pain [R. T. pp. 259-260].

The Government then called John Hester, the owner of the gas station in Lynn, Massachusetts, as a rebuttal witness. Mr. Hester testified to the usual business practice of making notations of changes on the Hertz rental contracts, and to the fact that no record of any change in defendant's contract could be found [R. T. pp. 261-262]. On cross-examination, Mr. Hester could not recall who would have relieved Mr. Warrington on his night off [R. T. pp. 264-265].

As a second rebuttal witness, the Government called Special Agent Riley L. Millard of the Federal Bureau of Investigation. Agent Millard testified that he had been present when defendant was interviewed at the Santa Barbara Police Department by Agent Thornton [R. T. p. 269]. Agent Millard's testimony supported Agent Thornton's prior testimony as to what occurred at that interview [R. T. pp. 270-281].

QUESTIONS PRESENTED

I THE EVIDENCE WAS SUFFICIENT TO SUSTAIN CONVICTION.

A. There Was Sufficient Evidence To Establish the Corpus Delicti.

B. There Was Sufficient Evidence of Scienter.

II THE PROSECUTING ATTORNEY COMMITTED NO ERROR IN CLOSING ARGUMENT.

A. This Issue Cannot Be Raised Here For the First Time.

B. The Prosecuting Attorney Committed No Prejudicial Error.

III THE DISTRICT COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO REOPEN AND FOR NEW TRIAL.

A. The Motion to Reopen After Both Sides Rested.

B. The Motions to Reopen and For New Trial Based On New Evidence.

IV CONCLUSION

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN CONVICTION

When dealing with questions of the sufficiency of the evidence to sustain a conviction, the reviewing court must consider the evidence in the light most favorable to the Government.

> Glasser v. United States, 315 U.S. 60 (1942);
>
> Papadakis v. United States, 208 F.2d 945 (9th Cir. 1954);
>
> Barnard v. United States, 342 F.2d 309, 317 (9th Cir. 1965), cert. denied 382 U.S. 948 (1965), reh. denied 382 U.S. 1002 (1966);
>
> Kaplan v. United States, 329 F.2d 561 (9th Cir. 1964).

A. There Was Sufficient Evidence to Establish the Corpus Delicti.

Viewed in the light most favorable to the Government, the evidence establishes that the Hertz Company owned a black 1964 Ford, serial number 4E64C112468, bearing Massachusetts license L46494. Both the serial number and the color appear on the Massachusetts registration, Government's Exhibit No. 1. Secondly, the defendant rented this same car from Mr. Warrington in Lynn,

Massachusetts; the rental contract, Government Exhibit No. 2, signed by defendant, contained a description of the car as a 1964 Ford sedan bearing Massachusetts license L46494. Third, the car found in Hollywood, California, was a black 1964 Ford, serial number 4E64C112468, bearing Massachusetts license L46494, according to the testimony of Agent Ryan. Finally, defendant admitted renting a black Ford from Mr. Warrington and driving it across country to Los Angeles [R. T. pp. 168-186].

Appellant points to two defects in this evidence: first, that the serial number of the car rented to defendant was not proved; and second, that Mr. Warrington testified that the car was dark maroon rather than black. These two discrepancies do not, as appellant contends, bring the case "squarely within the rule" of Tyler v. United States, 323 F. 2d 711 (10th Cir. 1963). In Tyler, the only evidence was the year and make of the car; here, in contrast, we have the serial number, the license plate, and the color, make, model and year of the car established both in Massachusetts and in California, plus the defendant's own admissions in Court. As the Tyler court itself has paid, "identification by serial number is not required when other competent evidence establishes that the car stolen and the car found in another state are one and the same". Welch v. United States, 360 F. 2d 164, 165 (10th Cir. 1966).

Nor is the dispute over color very weighty. Mr. Warrington's testimony, of a "dark maroon" car, concerned a transaction that occurred in the middle of the night [R. T. p. 168]; moreover,

dark maroon could appear to be black under certain lighting conditions. All other witnesses and Exhibits agree that the car was black. In a similar case, the Seventh Circuit found that when the car stolen was said to be green and all other witnesses said the car was light blue, the variance was "too trivial for discussion". United States v. Perry, 324 F. 2d 871 (7th Cir. 1963).

B. There Was Sufficient Evidence of Scienter.

The jury must determine the issue of defendant's intent from the totality of circumstances surrounding the taking of the car and the interstate transportation thereof. Viewed in the light most favorable to the Government, there was abundant evidence supporting the jury's determination of guilt. Defendant knowingly used false pretenses in renting the car. Although familiar with car rental procedure, defendant immediately left the state with the car, in violation of the contract. Although the defendant claimed to have gotten an extension by telephone, there was conflicting testimony on this point; the jury's verdict has conclusively determined this factual question adversely to defendant.

Defendant relies heavily on his claimed intention to return the car at some later date, and the impossibility of doing so because of the car's disappearance. However, the jury's verdict must be taken to mean that defendant formed such an intent subsequent to the interstate transportation, if at all. As this Court has

pointed out, even an actual subsequent return of the car, past the due date, would not negative the original intent. Jarvis v. United States, 312 F.2d 563, 564 (9th Cir. 1963).

II

THE PROSECUTING ATTORNEY COMMITTED NO ERROR IN CLOSING ARGUMENT.

A. This Issue Cannot Be Raised Here For the First Time.

A search of the record fails to disclose that appellant objected at trial to either of the alleged errors in the argument to the jury. As stated in White v. United States, 315 F.2d 113 (9th Cir. 1963), cert. denied 375 U.S. 821 (1963), at page 116:

> "But even had there been a taint of unfairness or prejudice, no voice was raised in protest - no objection ever raised - no chance given the trial court to cure any alleged error. This is a complete waiver."

See also:

Orebo v. United States, 293 F.2d 747 (9th Cir. 1961), cert. denied 368 U.S. 958 (1962);

Patterson v. United States, 361 F.2d 632 (8th Cir. 1966).

B. The Prosecuting Attorney Committed No Prejudicial Error.

Even if the issue could now be raised, there was no prejudicial error in the argument. It is well-settled in the Ninth Circuit that a prosecutor may state to the jury his belief that a witness is lying, without violating the rule of Berger v. United States, 295 U.S. 78 (1934).

> Williams v. United States, 265 F.2d 214, 217 (9th Cir. 1959);
>
> Hallinan v. United States, 182 F.2d 880, 885 (9th Cir. 1950).

Secondly, the alleged misstatement of the evidence was hardly prejudicial. Even the two-day or ten-day extension appellant claims to have gotten by telephone would not establish his innocence. Moreover, this single statement by the prosecuting attorney is a far cry from the "pronounced and persistent" misconduct in the Berger case, where the Court was constrained to find "a probable cumulative effect upon the jury which cannot be disregarded as inconsequential". 295 U.S. 78 at page 89. This is not a case where the attorney's misstatement, for example, means the difference between a strong abili and no alibi. Corley v. United States, 365 F.2d 884 (D.C. Cir. 1966). Where there is no substantial prejudice shown, the appellant is not entitled to a reversal. Cross v. United States, 353 F.2d 454 (D.C. Cir. 1965).

III

THE DISTRICT COURT DID NOT ERR IN DENYING DEFENDANT'S MOTIONS TO RE-OPEN AND FOR NEW TRIAL.

A. The Motion to Reopen After Both Sides Rested.

Reopening a criminal case after both sides have rested is entirely within the trial court's discretion.

> Fernandez v. United States, 329 F.2d 899 (9th Cir. 1964), cert. denied 379 U.S. 832 (1964);
>
> Wolcher v. United States, 218 F.2d 505 (9th Cir. 1955), cert. denied 350 U.S. 822 (1955), reh. denied 350 U.S. 905 (1955);
>
> Haugen v. United States, 153 F.2d 850 (9th Cir. 1946);
>
> Reining v. United States, 167 F.2d 362 (5th Cir. 1948), cert. denied 335 U.S. 830 (1948);
>
> Henry v. United States, 204 F.2d 817 (6th Cir. 1953);
>
> Maupin v. United States, 225 F.2d 680 (10th Cir. 1955).

It has been said that the Court must be very reluctant to permit a reopening because of the undue emphasis such a procedure places on the evidence in the minds of the jury.

Eason v. United States, 281 F.2d 818

(9th Cir. 1960);

United States v. Bayer, 331 U.S. 532 (1947).

At the very least, defendant must show a reasonable excuse for the untimeliness of the evidence.

Eason v. United States, supra;

United States v. Boyer, supra.

In the instant case, defendant made no excuse for the untimeliness [R.T. p. 284]. Moreover, the further evidence offered was merely an additional denial by the defendant of the testimony of the two F.B.I. agents who interviewed him. It is submitted that there clearly was no abuse by the trial court of its wide discretion in this matter.

B. The Motions to Reopen and For New Trial Based on New Evidence.

A motion for new trial based on newly discovered evidence is also addressed to the discretion of the Court. Denial of such a motion may be overturned only on a showing of clear error or abuse.

Maldonado v. United States, 325 F.2d 295

(9th Cir. 1963);

Beyda v. United States, 324 F.2d 526

(9th Cir. 1963);

Maldonado v. United States, 310 F.2d 84

(9th Cir. 1962).

There are five requirements which must be met for such a motion to succeed. The evidence must be (1) newly discovered, (2) after diligence on the part of counsel failed to produce the evidence at trial; (3) the evidence must not be merely cumulative or impeaching, but (4) material to the issues; and (5) it must be such that it would probably produce an acquittal.

> Beyda v. United States, supra, p. 531;
>
> Pitts v. United States, 263 F.2d 808 (9th Cir. 1959), cert. denied 360 U.S. 919 (1959);
>
> Brandon v. United States, 190 F.2d 175 (9th Cir. 1951).

It cannot be effectively argued that the existence of a witness and the purported testimony of such person known to appellant prior to trial is "newly discovered" evidence. It is uncontested that appellant was both aware of the existence of the witness, Tracy Hudson, and of her anticipated testimony prior to trial [R.T. p. 324, lines 5-25; p. 325, lines 1-3].

Similarly, it cannot be strenuously contended by appellant at this time that the presence of this witness was vital to his case. A careful review of the record failed to reflect any pre-trial motion on the part of appellant to gain a continuance of the matter to allow further search for the witness; nor the existence of any statements by appellant, made to the Court, that this witness was material to his defense. This is further borne out by an examination of the nature of the proffered new testimony; all of the proffered testimony, except that dealing with Tracy Hudson's activities after leaving

defendant, would be of facts and circumstances already known to defendant and testified to by him; we submit that such evidence fails all of the requirements set forth in Beyda, supra.

As to the remaining part of the proffered new testimony, dealing with Tracy Hudson's activities subsequent to her leaving defendant, the only issue in the case to which this would be relevant is whether the car found was the same car as was stolen. And, it is submitted, the proffered testimony supports the Government on this issue. It can hardly be said that this evidence would "probably produce acquittal".

It is clear, then, that the trial court's denial of these motions was not an abuse of discretion, but rather was clearly correct.

IV

CONCLUSION

For the reasons given above, this Court should affirm the judgment below.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROBERT M. TALCOTT,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert M. Talcott

ROBERT M. TALCOTT

NO. 21540

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE RIOS-RAMIREZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
RONALD S. MORROW,
Assistant U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

NO. 21540

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE RIOS-RAMIREZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
RONALD S. MORROW,
Assistant U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 21540

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE RIOS-RAMIREZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

I

STATEMENT OF JURISDICTION

On January 26, 1966, appellant was indicted, along with three other defendants, in two counts, by the Federal Grand Jury for the Southern District of California, Central Division, for transporting and selling heroin on January 10, 1966, in violation of Title 21, United States Code, Section 174 [C. T. 2]. 1/ Following a trial by jury before the Honorable Francis C. Whelan, United States District Judge, from February 17, 1966 to February 25,

---

1/ "C. T." refers to Clerk's Transcript.

1966, appellant Jose Rios-Ramirez was found guilty of both counts [C. T. 19].

Appellant was convicted and sentenced on March 28, 1966, to the custody of the Attorney General for seven years on each count, the sentences to run concurrently [C. T. 79].

Appellant filed, on April 5, 1966, a Notice of Appeal from the Judgment [C. T. 87].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States, . . . contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported, or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition,

may be fined not more than $20,000."

* * * * *

"Whenever on trial for a violation of this section the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to sustain conviction.

2. Whether the Court erred in admitting the statement of a co-defendant which, by limitation of the court, did not refer to the appellant.

3. Whether the Court in refusing the entrapment instruction offered by another defendant committed plain error as to the appellant who did not offer an entrapment instruction and accepted the charge as given without objection.

IV

STATEMENT OF FACTS

On January 10, 1966, at approximately 5:30 P. M., Agents Chris V. Saiz and Sergio Borquez, in the company of an informant, entered the Diamond Hotel in Los Angeles, California, and proceeded to room 331 [R. T. 160-63]. 2/ Said hotel was located between the United States Courthouse and the Federal Building [R. T. 60-63]. At that time the three met with Andres Ramirez. (Ramirez, a co-defendant of appellant, entered a plea of guilty to Count 2, Sale of heroin [R. T. 181, 784-85].)

Saiz asked "Mr. Ramirez if he had some heroin to sell, and Mr. Ramirez stated that he did and would sell Agent Saiz some heroin . . . but that his partners who had the heroin with them were not there" [R. T. 182]. Ramirez stated he had three partners and arrangements were made to meet again at 9:30 P. M. [R. T. 183]. Ramirez assured the agents that his three partners would be there at 9:30 with an ounce of heroin for each agent [R. T. 186-87].

At approximately 9:40 P. M. on January 10, 1966, Borquez and Saiz went to room 331 where they were introduced by Ramirez to appellant, Lillian Moya-Manzano, a co-defendant and Jesus Rodriguez, a co-defendant [R. T. 164-65], as his three partners [R. T. 200].

2/ "R. T." refers to Reporter's Transcript.

Ramirez stated that appellant was the man with whom Saiz should discuss the sale [R. T. 282]. Appellant stated he had the heroin available. Appellant was asked how good the heroin was and Rodriguez stated that it was "very good heroin, that it was exceptional quality, and that it could be cut six or seven times . . ." [R. T. 285]. When Saiz stated he wanted one ounce, appellant told Manzano to get it and gave her a key [R. T. 285, 573]. Manzano left the room [R. T. 285].

Rodriguez stated in appellant's presence that he had talked with his source of supply in Tijuana that day and that the source stated the subject heroin could be cut six or seven times because of its good quality [R. T. 207]. In fact, the substance delivered was 24. 9% heroin hydrochloride [Stipulation of Fact, C. T. 13].

At various times all four defendants stated that it was good quality heroin [R. T. 215]. While Moya was still out of the room, appellant stated the heroin would cost $550[R. T. 286]. At the same time Rodriguez stated he brought the heroin directly from Mexico [R. T. 287].

When Moya returned to the room she handed appellant a rubber contraceptive containing the brown powder referred to in the Stipulation as 23. 660 grams of heroin [R. T. 288].

Once appellant had the heroin he asked for $550 [R. T. 293]. When Agent Saiz stated he only had $400, appellant insisted upon $550 [R. T. 293]. Rodriguez stated that "two spoons" should be taken out [R. T. 293]. Both agents asked appellant if they could have the heroin on consignment until the next day [R. T. 293]. After

prodding by appellant's co-defendants, appellant agreed to let the agents have the heroin for $400 that night if they would return the next day with the remaining $150 [R. T. 293-94].

At that point Agent Saiz handed appellant $400 who in turn handed Saiz Exhibit One in evidence [R. T. 294].

Appellant and his co-defendants were then arrested by agents of the Federal Bureau of Narcotics at approximately 10:00 o'clock P. M. that night [R. T. 217].

At the time of the arrest appellant threw on the floor the currency previously handed him by Saiz [R. T. 331, 179]. The serial numbers of the retrieved bills matched those of the bills handed Rios by Saiz [R. T. 433-34].

Appellant testified that he did not knowingly receive, and conceal, or sell any heroin to agents Borquez or Saiz [R. T. 541]. "Andres [Ramirez] never gave me the least idea that he was making that kind of business." [R. T. 541].

V

ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN CONVICTION.

The evidence, as shown by the Statement of Facts, provides ample proof for conviction. Suffice it to say, appellant's possession of the heroin "is sufficient for conviction". Aside from the statutory presumption, one of appellant's co-defendants stated, in appellant's

presence, that he brought the heroin directly from Mexico [R. T. 287].

The Ninth Circuit needs no reminder that it is not for an appellate court to weigh the evidence or to determine the credibility of witnesses. A verdict of conviction must be sustained if, taking the view most favorable to the Government, there is substantial evidence to support it.

> Glasser v. United States, 315 U.S. 60, 80 (1942); Nye & Nissen v. United States, 168 F.2d 846 (9th Cir. 1948), aff'd.,336 U.S. 613 (1949).

Appellant's argument on appeal as to sufficiency of the evidence is based solely on the appellant's testimony as related to the trial court, and completely disregards the evidence favorable to the government and the test of sufficiency to be applied on appeal.

B. THE CO-DEFENDANTS POST ARREST STATEMENTS WERE THE RESULT OF A PROPER CONSTITUTIONAL WARNING AND WERE NOT ADMITTED AGAINST APPELLANT.

Appellant raises the point that under Miranda v. Arizona, 384 U.S. 436 (1966), co-defendant Moya-Manzano was not advised of her right to have a court-appointed attorney present during any questioning. Aside from the fact that the case was tried between February 17 and 25, 1966 and that Miranda is not retroactive, Moya-Manzano was advised "that she had the right to have an attorney . . ." [R. T. 307]. The trial court, at R. T. 327 and R. T.

330 found that such admonition was given, found that her constitutional rights were not violated and admitted a limited portion of what she had told the agent, excluding all reference to appellant. There is no citation of any objection to the admission of her admissions as limited. In fact, appellant waived any objection he might have by virtue of his questioning Moya-Manzano with respect to said post-arrest statements [R. T. 586-88].

C. THERE WAS NO PREJUDICIAL ERROR TO THIS APPELLANT BY THE TRIAL COURT'S REFUSAL TO GIVE AN ENTRAPMENT INSTRUCTION REQUESTED BY A CO-DEFENDANT.

Although appellant's opening brief states, "The Court Committed Prejudicial Error In Refusing Defendant's Instruction on Entrapment", no citation is made to the instructions refused, or the part referred to totidem verbis, in violation of Rule 18 of the Ninth Circuit.

Appellant did not offer any instruction pertaining to entrapment [C. T. 47-50]. Following the charge to the jury, the following colloquy took place at R. T. 742:

> "THE COURT: Does anyone have any objection to the charge as given?
>
> "MR. TARLOW: No, not for Rios."

If there had been any request for such an instruction by Rios, it would certainly have been waived by counsel.

Factually, appellant did not claim to have been entrapped. Appellant testified that he had no plans to sell heroin [R. T. 529], did not knowingly receive and conceal heroin [R. T. 541], did not sell any heroin to agents Saiz or Borquez [R. T. 541], and "Andres never gave me the least idea that he was making that kind of business" [R. T. 541].

Assuming appellant had standing to object to the court's refusal to charge the jury on entrapment as requested by co-defendant Rodriguez, this Court should uphold the trial court's ruling. The Ninth Circuit in Ortiz v. United States, 358 F. 2d 107, 108 (9th Cir. 1966), stated:

> "This court has many times held that where a defendant denies the commission of a crime, he is not entitled to the defense of entrapment."

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

RONALD S. MORROW,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow
RONALD S. MORROW

NO. 21540

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE RIOS-RAMIREZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

(NOW THE CENTRAL DISTRICT)

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

RONALD S. MORROW
Assistant U. S. Attorney

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

688-2434 or 688-2413

Attorneys for Appellee,
United States of America

NO. 21540

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE RIOS-RAMIREZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

(NOW THE CENTRAL DISTRICT)

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

RONALD S. MORROW
Assistant U. S. Attorney

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

688-2434 or 688-2413

Attorneys for Appellee,
United States of America

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 21540

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE RIOS-RAMIREZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

I

STATEMENT OF JURISDICTION

On January 26, 1966, appellant was indicted, along with three other defendants, in two counts, by the Federal Grand Jury for the Southern District of California, Central Division, for transporting and selling heroin on January 10, 1966, in violation of Title 21, United States Code, Section 174 [C. T. 2].[1/] Following a trial by jury before the Honorable Francis C. Whelan, United States District Judge, from February 17, 1966 to February 25, 1966, appellant Jose Rios-Ramirez was found guilty of both

---

1/ "C. T." refers to Clerk's Transcript.

counts [C. T. 19].

Appellant was convicted and sentenced on March 28, 1966, to the custody of the Attorney General for seven years on each count, the sentences to run concurrently [C. T. 79].

Appellant filed, on April 5, 1966, a Notice of Appeal from the Judgment [C. T. 87].

On December 5, 1967, this Court affirmed the conviction, Rios-Ramirez v. United States, 386 F. 2d 831 (9th Cir. 1967).

On August 21, 1968, the Honorable Stanley Barnes, Circuit Judge for the Ninth Circuit, signed an order which states that "this Court now sets aside its affirmance of appellant's conviction and reinstates said appeal . . ."

The District Court had jurisdiction under the provisions of Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States, . . . contrary to law, or receives, conceals, buys,

sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported, or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000."

* * * * * * *

"Whenever on trial for a violation of this section the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

QUESTION PRESENTED

Whether Bruton v. United States requires a reversal of the instant case.

IV

STATEMENT OF FACTS

The statement of facts appearing in the Brief for Appellee filed in the first appeal is hereby incorporated by reference.

There is no reference in the Opening Brief for Appellant to the transcript of the reporter relating where, in the trial, the error took place. Reference will now be made to those portions of the reporter's transcript which appellant may have had in mind. The following portions are the only relevant portions to the best of the appellee's knowledge:

At p. 333, the following appears in the testimony of Agent Chris Saiz of the Federal Bureau of Narcotics:

> " . . . She [Manzano] told me that she had obtained it in a room in the hotel.
>
> I asked her if she would take us there, show us the room, and she stated she would."

At p. 334:

> "THE WITNESS: She told me she had gone to the room and had gone to a dresser drawer, had taken the rubber condom with the heroin, and had returned to Room 331, and that was the heroin she had given to Rios."

Saiz, at 288, testified that Manzano, in his presence, did hand Rios the subject heroin.

At various points in the transcript Judge Whelan admonished the jury that the statements of Manzano were to be considered only with reference to her.

Manzano, herself, testified from 560 to 607 and said that she handed the heroin to Rios-Ramirez, at 573, 574, 575, 576 and

577. She was cross-examined by appellant's counsel from 582 to 599. Cross-examination of Manzano by appellant's counsel in reference to handing the heroin to appellant appears at 592 and 593. Also, at 583, 585, 587-88 and 591 there is cross-examination of Manzano by appellant's counsel relative to her statements to Saiz, thereby adopting these statements for his purposes.

In Manzano's direct examination she testified that she handed the heroin to Rios-Ramirez, at 573, 574, 575, 576 and 577.

V

ARGUMENT

BRUTON v. UNITED STATES DOES NOT REQUIRE REVERSAL OF THE CONVICTION AND IS NOT APPLICABLE.

In Bruton v. United States, _____ U.S. _____, 20 L.Ed. 2d 476 (1968), the Supreme Court held where a co-defendant does not testify, and his confession is admitted which implicates other defendants on trial, then there is a deprivation of the right to be confronted by one's accusers and reversal is required. In Bruton neither defendant testified or offered any evidence at the trial, Evans v. United States, 375 F.2d 355, fn. 2 at 357 (8th Cir. 1967).

In the instant case Rios-Ramirez was not deprived of his confrontation rights inasmuch as Manzano testified, and was cross-examined by Rios-Ramirez's attorney. The right the

Supreme Court has protected by its Bruton decision was protected by Judge Whelan since there was no deprivation of the right to be confronted.

It is problematical whether reversal would be required under the retroactive application of Bruton if Manzano had not testified. Even under those circumstances it is doubted that Rios-Ramirez would have been prejudiced by the admission of the one mention of his name. Saiz testified as to his personal observation of the negotiations by Rios-Ramirez, and his receipt of the purchase price after handing Saiz the heroin. Rios-Ramirez admitted, on the stand that he received the money from Saiz, at p. 538, and then had the money in his possession when the agents returned to make the arrest, at 539-40.

CONCLUSION

The conviction should be affirmed for the above-stated reasons.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

RONALD S. MORROW
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America

No. 21542

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN F. CRANE AND JOHN E. MARSH,

Appellants,

vs.

STATE OF CALIFORNIA, ET AL.,

Appellees.

REPLY BRIEF OF APPELLEES COPLEY PRESS, INC. AND UNION TRIBUNE PUBLISHING CO.

HENRY E. KAPPLER
Suite 321 Sunset-Vine Tower
6290 Sunset Boulevard
Los Angeles, California 90028
Attorney for Appellees

Jeffries Banknote Company, Los Angeles — MA 7-9514

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 21542

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN F. CRANE AND JOHN E. MARSH,

Appellants,

vs.

STATE OF CALIFORNIA, ET AL.,

Appellees.

REPLY BRIEF OF APPELLEES COPLEY PRESS, INC. AND UNION TRIBUNE PUBLISHING CO.

JURISDICTIONAL STATEMENT

Appellants' claim of jurisdiction rests upon 28 USC 1331 (a) and (b) and 1332 (Opening Brief p. iii; p. 25 l. 8-26) although countless other statutes and constitutional provisions are set forth on p. ii, none of which are applicable to these appellees, who assert that the District Court had no jurisdiction over any purported cause of action which appellants may have against these appellees.

No diversity of citizenship exists in this case of the type sufficient to confer jurisdiction upon the United States District Court. Diversity jurisdiction contemplates a *complete* diversity between plaintiffs on the one hand and defendants on the other. No such diversity of citizenship exists here. Both plaintiffs are citizens of California.

Most, if not all of the defendants are also citizens of California, and there is no basis for any claim of Federal Jurisdiction predicated upon Diversity of Citizenship.

Appellees are publishers of newspapers who allegedly published a libel concerning plaintiffs (Opening Brief p. 65; p. 12; Appendix p. 34, 51, 52).

Libel is a tort cognizable under the laws of the State of California. (See Civil Code 45.) No Federally protected right is involved and none is shown by appellants in the countless pages of charges against these appellees.

STATEMENT OF FACTS

Appellants John F. Crane and John E. Marsh were arrested in San Diego on various charges, tried and convicted. An appeal was taken to the California Appellate Courts and ultimately a decision was rendered by the Supreme Court of the State of California entitled *People vs. Marsh,* 58 Cal.2d 732 (1962). The facts are set forth in the opinion which affirmed at least a portion of the judgment of conviction. Thereafter Crane and Marsh served some time in the penitentiary. Following their release they commenced an original action in the United States Court of Appeals (Nov. 4, 1964). This action was dismissed by this Court (O.B. p. 23). An appeal was denied by the Supreme Court of the United States and thereafter the lawsuit was refiled in 1966 in the United States District Court and dismissed by the District Court with leave to amend. A supplemental and amended complaint was then filed (O.B. p. 24) purporting to set forth 39 causes of action.

A motion to dismiss was filed on behalf of these appellees. The grounds of the motion included the assertion that the "supplement No. 1 and amended complaint" failed to state a cause of action within the jurisdiction of the United States District Court in that the complaint on its face did not set forth any diversity of citizenship.

It was further claimed that any purported cause of action against appellees was barred by Section 340(3) of the Code of Civil Procedure of the State of California. Additionally it was claimed that the complaint on its face did not set forth any cause of action predicated upon the breach of any Federal right or Federal law.

The Court thereafter granted the motion of appellees and this appeal has followed.

It is almost impossible to ferret out from amongst the countless pages of material *any* charges against these appellees, let alone any allegations which would be sufficient to create any cause of action, be it common law or by reason of some Federally created right.

The thrust of appellants complaint appears to be directed against the State of California, the City and County of San Diego, the Department of Public Health of the State of California, all of the members of the Supreme Court of the State of California (i.e. the justices who participated in the decision in *People v. Marsh,* 58 Cal.2d 732, 26 Cal.Rptr. 300) as well as countless individuals connected in some manner with the prosecution of the criminal case.

The sole participation of appellees Copley Press and Union Tribune Publishing Co. appears to have been by

reason of a publication on November 19, 1960, of a newspaper account of the arrest of the appellants in connection with a two year investigation of a cancer cure racket and the fact that three persons were charged in the District Attorney's complaint with grand theft and conspiracy. (App. P. 51; Supplement No. 1 and amended complaint p. 2; p. 5).

So far as appellees can determine this is the *only* tort claimed to have been committed by them. Appellees have reviewed the opening brief under the caption "Argument" (pp. 42-74) and note that the single caption, "K. Libel and Slander" p. 65 is the only one which could possibly apply to these appellees. The "argument" is in fact *no argument*. No point is raised. The alleged libel is not set forth. No authorities are set forth. There appears to be no correlation between this point in the argument and the fifty specifications of errors set forth in Opening Brief 33 to 41, only one of which even remotely relates to libel. It reads as follows: (No. 22 O.B. p. 34) "(22) Trial court joined in libel and slander feloniously." This specification could scarcely be intended to relate to these appellees whose publication was months and months *prior* to the criminal trial of the appellants and clearly unrelated to any subsequent conduct of the trial judge and others involved in the criminal proceeding.

CONTENTIONS OF APPELLEES

Appellees make the following contentions:

1. There is no allegation in any of the material which has been filed with this court setting forth a

diversity of citizenship between the plaintiffs and these appellees.

2. There are no allegations in any of the pleadings which allege the violation by these appellees of any Federally created right or the violation of any Constitutional right.

3. The purported cause of action appears on its face to involve a claim of libel published on November 19th of 1960. In the Federal Court it is well settled that the statute of limitations of the State wherein the District Court is located is the applicable statute of limitations. In California the limitation of actions in connection with an action for libel is found in Code of Civil Procedure Section 340(3) wherein a one year statute of limitations is provided. There are no facts set forth on the face of the complaint which would in any manner toll the running of the statute of limitations.

ARGUMENT

I

WHERE JURISDICTION IS PREDICATED UPON DIVERSITY OF CITIZENSHIP, THERE MUST BE APPROPRIATE ALLEGATIONS IN THE PLEADINGS SETTING FORTH THE DIVERSITY

Plaintiffs' complaint, amended, appears to attempt on its face (p. 2 lines 14 to 32) to set forth a cause of action based upon an alleged libel published on November 19, 1960. There are no allegations in the amended complaint or in any other pleading alleging a diversity of citizenship between the plaintiffs and these appellees. Since the action

against these appellees is predicated solely upon a common law claim of libel as codified in the California Civil Code Section 45, it is apparent that the only basis for jurisdiction against these appellees must be upon the theory of diversity of citizenship. That appellants were relying upon diversity as a basis for the jurisdiction of the District Court is apparent from Page iii of the Brief of appellants. In the statement of jurisdiction filed in this court, there is no suggestion that any jurisdiction is claimed to exist against these appellees, predicated upon the violation of any Federal Law or Federal right.

It is well settled that facts which are essential to Federal jurisdiction must be set forth in the pleadings.

> *Alexander v. Westgate Greenland Co.,*
> (CCA Cal.) 111 Fed.2d 769.

> *McNutt v. General Motors,* 298 US 178.

It is further fundamental that where jurisdiction is predicated upon diversity of citizenship, such diversity must appear on the face of the pleadings.

More fundamentally it must appear that no plaintiff is a citizen of the same state with any defendant, is diversity must be complete.

> *Merserole v. Union Paper Collar Co.,*
> 17 Fed.Cas. 488.

> *Evarts v. Jones* (CCA Cal.),
> 228 Fed.2d 105.

> *Caraway v. Ford Motor Co.,* 144 Fed.2d 295.

It is apparent from the pleadings of the appellants that they are residents of the State of California. Ob-

viously the great majority of the defendants are likewise residents of the State of California and there is no allegation in the pleadings, original or amended nor is there any assertion in the briefs, that these appellees Union Tribune Publishing Co. and Copley Press Inc. were anything other than citizens of the State of California. It is submitted that the ruling of the trial court was clearly proper and that there was no jurisdiction to entertain the plaintiffs complaint against these appellees. See *Treiner v. Sunshine Mining Co.,* 308 US 66.

II

NO VIOLATION OF ANY FEDERAL LAW OR FEDERALLY CREATED RIGHT IS SET FORTH IN THE APPELLANTS' PLEADINGS

Even though no diversity of citizenship exists, it would be possible in certain cases for jurisdiction to be laid in the Federal Court. While as to certain of the defendants perhaps, there are charges that the appellees constitutional rights have been infringed upon, any purported cause of action against the appellees Copley Press and Union Tribune Publishing Co. appear to be founded solely upon a common law tort as codified in Section 45 of the California Civil Code, to-wit, libel. Obviously the State Courts of California have jurisdiction over such a cause of action. There is nothing in the complaints or in the briefs to suggest any other or different cause of action against these appellees than the purported cause of action for libel.

Where the cause of action (libel in this case) is created by State law no basis exists for federal jurisdiction. cf. *Moore v. Chesapeake & O. Ry. Co.,* 291 US 205.

Here again it is essential that the appellants in their pleadings set forth facts which demonstrate the existence of Federal jurisdiction by a well pleaded complaint. This has not been done. See *Alexander vs. Westgate Greenland Co.* (CAA Cal.), 111 Fed.2d 769 (supra).

III

THE ACTION OF THE COURT IN DISMISSING THE AMENDED AND SUPPLEMENTAL COMPLAINT WAS PROPER SINCE IT WAS DEMONSTRATED ON THE FACE OF THE COMPLAINT THAT ANY PURPORTED CAUSE OF ACTION WAS BARRED BY THE PROVISIONS OF CALIFORNIA CODE OF CIVIL PROCEDURE, SECTION 340(3)

It is well settled in California that an action for damages for libel must be commenced within one year from the date of the wrongful act. The alleged publications charged against these defendants are apparently set forth on page 2 of the amended complaint wherein the date of November 19, 1960 is alleged. While other publications are alleged to relate to other defendants on different dates, these appear to be unrelated to any claim against these appellees. It is respectfully submitted that there is nothing on the face of the amended and supplemental complaint to take the case out of the one year statute of limitation and that the supplemental and amended complaint on its face demonstrates that it is barred and that plaintiffs have no cause or causes of action.

See *Belli v. Roberts Bros. Furs,* 240 ACA 295, 49 Cal.Rptr. 625 (1966).

California Code of Civil Procedure 340 provides in part as follows: "Within one year: * * * 3. action for libel, slander * * * ".

The rule is well settled in Federal courts that the limitation statute of the jurisdiction wherein the suit is brought will govern.

See *Schram v. Robertson* (CCA Cal.), 111 Fed.2d 722 (1940).

CONCLUSION

It is respectfully submitted that the action of the District Court was the only proper action which could have been taken insofar as these appellees are concerned and that the judgment of dismissal should be affirmed.

Respectfully submitted.

HENRY E. KAPPLER

Attorney for Appellees
Copley Press, Inc. and
Union Tribune Publishing
Company

CERTIFICATE OF FILING ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HENRY E. KAPPLER

United States of America.

See Vol. 3400

No. 21,551

United States Court of Appeals
For the Ninth Circuit

The MT Standard Oiler and Standard Oil Company of California, a corporation,
Appellants,

vs.

Hamburg-America Line, a corporation,
Appellee.

PETITION FOR REHEARING

Graham & James
Walter M. Schey
310 Sansome Street
San Francisco, California 94104
Attorneys for Appellee and Petitioner

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Attorneys for Appellee,
United States of America.

No. 21,551

United States Court of Appeals

For the Ninth Circuit

The MT Standard Oiler and Standard Oil Company of California, a corporation,
Appellants,

vs.

Hamburg-America Line, a corporation,
Appellee.

PETITION FOR REHEARING

To the Honorable Chambers, Pope and Hamley, Circuit Judges for the United States Court of Appeals for the Ninth Circuit:

Appellee Hamburg-America Line, on the below listed grounds, petitions this Court for a rehearing as to its judgment of January 11, 1968 reversing the Trial Court by finding fault on the part of the VOGTLAND:

1. THE DIAGRAM CONTAINED IN THIS COURT'S OPINION, CLEARLY THE CORNERSTONE OF THE OPINION, IS SO OUT OF PROPORTION AS TO SUGGEST THAT THIS COURT'S OPINION WAS BASED ON AN ERRONEOUS IMPRESSION OF THE RECORD.

The distances and angles described in this diagram are vitally important since they reflect the basis of this Court's reasoning that the VOGTLAND (improperly)

Attorneys for Appellee,
United States of America.

"practically completely" filled the 300-foot channel. The fixed measurements have at no time been in dispute.[1] However, the diagram indicates material misapprehension of the fundamental facts of the record. The VOGTLAND is shown at double its actual width (precisely 132 feet as opposed to 65 feet) with its length as being over 610 feet (with no end in sight) although its actual length is 500 feet. The buoys are placed 660 feet apart; in fact they were 525 feet apart, which afforded the VOGTLAND, at its angle of approach, a one-third larger "opening" than is depicted on the diagram.

Attached hereto as Appendix I, superimposed upon this Court's diagram, is a scale drawing intended to precisely show the undisputed measurements, from which can be seen that the VOGTLAND simply did not "fill the channel".

---

2. THERE WAS NO TESTIMONY FROM ANY FACTUAL WITNESS TO THE EFFECT THAT THE VOGTLAND "FILLED" THE CHANNEL—AND SUCH TESTIMONY CERTAINLY WOULD HAVE BEEN FORTHCOMING IF THIS HAD BEEN THE CASE.

3. IN SUPPORT OF ITS "FILLING THE CHANNEL" CONCLUSION THIS COURT REFERS TO CAPTAIN HULME'S DIRECT TESTIMONY, BUT IT IS EVIDENT THAT THE TRIAL COURT WAS INFLUENCED PRIMARILY BY THIS WITNESS'S RETRACTION (AND OTHER EQUIVOCATION) UNDER CROSS EXAMINATION.

In his direct testimony Captain Hulme, an expert witness called by the STANDARD OILER and referred to in this Court's opinion as "an old time pilot familiar

---

[1]Citations to the Transcript for the fixed measurements are at p. 2, Appellee's Brief.

with this area,"[2] stated that the VOGTLAND would "utilize a good portion of that opening" (Tr. 267). On cross, upon being asked to demonstrate at the blackboard exactly how the VOGTLAND would "take up" the opening, Captain Hulme began by confessing:

> "Well, please understand I don't know exactly how wide and close she was to the buoy, but * * *" (Tr. 278, lines 3-4),

continued by drawing the VOGTLAND far too large in scale, drew an erratic 30° change in course which did not occur and had her run over buoy 18A, which she did not (Tr. 277-9, 281), and concluded as follows:

> The Court: The ship, taking the course you have indicated, wouldn't be taking up practically the entire distance?
>
> Witness: No, Sir. (Tr. 279, lines 15-18).

It is obvious that the Trial Court, having had opportunity to observe Captain Hulme (whose qualifications and candor were, under cross, placed very much in doubt),[3] simply did not believe his direct testimony [but apparently accepted his unguarded statement that he saw

---

[2]Opinion, p. 5.

[3]On direct, Captain Hulme purported to have experience with and be an expert with respect to vessels "similar" to the VOGTLAND and testified that the VOGTLAND's stopping time would have been three minutes (from full ahead to dead stop, reversing engines) (Tr. 261, 269); on cross, he first refused to name vessels that he had piloted that were "similar" to the VOGTLAND, then equivocated saying he had not done so since 1962 and had difficulty remembering, and then admitted that he would not be surprised if the VOGTLAND's stopping time were in fact six minutes twenty-nine seconds (Tr. 271-4).

When asked in how many vessel accidents he had been involved that had been the subject of U. S. Coast Guard proceedings, Captain Hulme said "two to three times" (Tr. 282); upon prompting he admitted to four (Tr. 284).

nothing wrong with the actions taken by the VOGTLAND (Tr. 276-7)].

This Court does competent seamen everywhere a disservice if it maintains that it is fault for a 65-foot wide vessel to pass a 30-foot wide vessel in a 300-foot wide channel, particularly where the channel boundaries are in fact 525 feet apart.

For the foregoing reasons, Appellee submits that this Court erred in reversing the judgment of the Trial Court and requests a rehearing.

Dated, San Francisco, California
February 7, 1968

Respectfully submitted,
Graham & James
Walter M. Schey
Attorneys for Appellee and Petitioner

Certificate of Counsel

I certify that I believe this Petition to be well founded and that it is not interposed for delay.

Walter M. Schey
Attorney for Appellee and Petitioner

Appendix I Follows

Appendix

MAN,
0012
Attorneys for Appellee,
United States of America.

Appendix I

Attorneys for Appellee,
United States of America.

~~NO. 21533~~ - A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CURLEY KING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
ANTHONY MICHAEL GLASSMAN,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

NO. 21533-A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CURLEY KING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
ANTHONY MICHAEL GLASSMAN,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 21533-A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CURLEY KING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

The appellant, Curley King, was indicted by the Federal Grand Jury for the Central Division of the Southern District of California on August 24, 1966 [C. T. 2]. 1/ The indictment was brought under Title 18, United States Code, Section 2113(a), Section 2, and Section 4. The indictment charged appellant Curley King with misprision of felony on April 29, 1966, and aiding and abetting a bank robbery on June 22, 1966.

1/ C. T. refers to Clerk's Transcript of Record.

Appellant pleaded not guilty to the indictment and after executing a waiver of trial by jury the case proceeded to trial before Judge A. Andrew Hauk [C. T. 7]. On October 20, 1966, appellant was found guilty of misprision of felony and acquitted of bank robbery [C. T. 9]. Thereafter appellant's notice of appeal was timely filed on November 14, 1966 [C. T. 13].

The jurisdiction of the District Court was based upon Title 18, United States Code, Sections 2113(a), 2, 4, 3231 and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294 and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

Title 18, United States Code, Section 4 provides as follows:

> "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both."

III

QUESTIONS PRESENTED

A. Was the evidence sufficient to sustain the judgment?

B. Is 18 U. S. C. §4 an unconstitutional impairment of a defendant's Fifth Amendment privilege against self-incrimination because it requires him to report his knowledge of the actual commission of a felony cognizable by a court of the United States to some judge or other person in civil or military authority under the United States?

IV

STATEMENT OF THE FACTS

On April 28, 1966, in an apartment in Los Angeles, a conversation took place between appellant, Curley King, his brother, Burley King, Jackie Dixon and Sharon Elizabeth Weston. The conversation related to the fact that Burley King wanted Sharon Weston to rob a bank.

On April 29, 1966, Sharon Weston carried out the plans of the previous day and robbed the Bank of America, Vermont and 30th Street Branch of $774 [R. T. 11, 22]. 2/ After the robbery Sharon entered a car containing Burley King and Jackie Dixon and made her getaway [R. T. 21]. Thereafter, the trio arrived at

---

2/ R. T. refers to Reporter's Transcript.

apartment 203 located at 1008 West 24th Street [R. T. 22]. During a meeting attended by Sharon, Jackie and Burley King appellant heard about the robbery over the radio. Burley King then gave appellant some of the stolen bank funds [R. T. 24]. Arrangements were made to have Sharon Weston and Jackie Dixon driven to the apartment of a friend, Pat Hood, so that they could be transported to San Francisco "until things cooled off" [R. T. 23, 113, 122].

Later that same day appellant drove Sharon Weston and Jackie Dixon over to Pat Hood's apartment [R. T. 113]. That evening Sharon and Jackie left Los Angeles for San Francisco [R. T. 25, 113].

V

ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JUDGMENT OF CONVICTION.

1. Receipt of Stolen Monies With Knowledge of the Source is an Affirmative Act of Concealment of the Crime of the Principal.

Appellant argues that the Government failed to prove one of the essential elements of the crime of misprision of felony, that appellant took some affirmative step to conceal the bank robbery committed by Burley James King (appellant's brother), Sharon Weston and Jackie Dixon. The transcript discloses that appellant

took the following steps to conceal the crime of the principals; he received and concealed part of the stolen bank funds, and, after arrangements had been made to transport Sharon Weston and Jackie Dixon to San Francisco, he drove the two girls to Pat Hood's apartment.

Appellant cited Lancey v. United States, 356 F. 2d 407 (9th Cir. 1966) for the proposition that appellant's act of receiving some of the stolen bank funds does not constitute an affirmative act of concealment. The basis for this argument is that in the Lancey case, supra, at footnote 2, pg. 411, the Court indicates that Lancey received some money from the principal and this act was not listed by the Court as an affirmative act of concealment. Appellant, therefore, argues that the omission of Lancey's receipt of monies from the principal "would seem to be indicative of the fact that mere receiving of the monies from the bank robbery, without more, is not enough of an act of concealment to be cognizable under the statute." Appellant's Brief, p. 9, lines 7-10. However, a careful reading of footnote 2 fails to substantiate appellant's argument.

In summarizing the chronology of events in the Lancey case the Court notes in Footnote 2 on page 411 that, "He admitted Zavada had paid him $100, gave him five $20 bills 'to pay for some rent,' but claimed he paid Zavada back." Thus, it is apparent that in the Lancey case the record, unlike the record in the case at bar, failed to establish that Lancey had received stolen bank funds from the principal knowing that the funds had been stolen. The best that can be gleaned from Footnote 2 is that Lancey received

some money from the principal and that he paid the principal back. The all important fact of the source of the money paid to Lancey and his knowledge of the source was never proved. In the case at bar, however, there is direct testimony from Sharon Weston that appellant did in fact receive some of the stolen bank funds well knowing that he was participating in the fruits of the robbery [R. T. 24].

It is also worth noting that in Footnote 1 the Court in Lancey does touch upon whether an affirmative step of concealment could be made out by proving that a defendant conceals part of the stolen monies but the Court goes on to state that in Neal v. United States, 102 F. 2d 643 (8th Cir. 1939), this type of an affirmative act was never proved. The Government would now urge this Court to hold that an affirmative step to conceal the crime of the principal is established where the Government proves that the defendant has received stolen monies knowing that the funds have been stolen.

2. Judging the Evidence in the Light Most Favorable to the Government the Record Sustains the Finding That Appellant Drove Sharon Weston and Jackie Dixon to the Apartment of Pat Hood Subsequent to the Robbery.

F. B. I. Agent Lenehan testified during his direct examination that appellant had stated to him that subsequent to the robbery on April 29th and after arrangements had been made to transport Sharon Weston and Jackie Dixon to San Francisco, appellant drove

the two girls to the apartment of Pat Hood [R. T. 113]. Then on cross-examination Agent Lenehan reaffirmed that it was his impression that appellant had stated that he had driven the girls over to Pat Hood's apartment but that "it could be correct or it could be incorrect" because to him the act was not material.

In determining whether Agent Lenehan's testimony supports the finding that appellant did in fact drive the two girls to Pat Hood's apartment the Court must not only carefully review his testimony but must also examine the record as a whole and then judge all of the evidence in the light most favorable to the Government. When ruling on appellant's motion for judgment of acquittal the trial judge, taking into consideration the entire record, found that:

> "I can't help but find . . . that there was full knowledge of the crime; that there was full knowledge of the flight after the crime; that Curley King having heard all these things on the radio and knowing all these things, drove the two girls over to Pat's house so that they could go to San Francisco. Sharon Weston says it. Curley says it. And I prefer to believe that the F. B. I. man told the truth in what Curley told him.
>
> "When I join that together with what Sharon said, that they were driven over that night to Pat's house and then they went to San Francisco, and the context of Curley's statement, that arrangements had been made to go to San Francisco, it is such

that I can't believe but . . . and to go with Pat's friend . . . that the only reason that he had for driving the two girls over to Pat's house was to get together with Pat's friend so that they could go to San Francisco until the thing cooled off." [R. T. 173].

Finally, in reference to the quality of the act necessary to sustain the required concealment this Court in Lancey, supra, at p. 410, has stated that, "A harboring of the criminal, with full knowledge, may be the positive act required to constitute the required concealment."

B. THE REQUIREMENTS OF 18 U.S.C. SECTION 4 ARE IN NO WAY VIOLATIVE OF APPELLANT'S FIFTH AMENDMENT RIGHTS.

Appellant argues that the requirement in Section 4 that he make known his knowledge of the commission of a crime cognizable by a Court of the United States is a violation of his Fifth Amendment rights against self-incrimination. Appellant goes on to say that if he had reported the crime of the principals after he had received the stolen bank funds he could have been prosecuted as an accessory after the fact under 18 U.S.C. Section 3.

However, the real question to be answered is -- was there a point in time when appellant could have made known the crime of the principals without incriminating himself in any way? The

answer to this question would seem to be that prior to appellant's receipt of the stolen monies from the principal he first learned of the principal's crime over the radio and at that point he was free to communicate this information to the authorities without any fear of incriminating himself in any way.

In two recent cases dealing with the Fifth Amendment the Supreme Court has amplified its views on the scope of the Amendment. Marchetti v. United States, and Grosso v. United States slip sheet opinion, January 29, 1968. In both of these cases involving the Federal Wagering Tax Statutes the Supreme Court held that it was a violation of a defendant's Fifth Amendment rights to make him register with federal authorities and give information regarding his own activities which were tantamount to a violation of state law. The registration requirements which were struck down related to the compulsion to report one's own illegal activities, not as in the case at bar, the activities of another. The Supreme Court pinpointed the crucial question when it stated at page 12 of the slip sheet opinion, "The question is not whether petitioner holds a 'right' to violate state laws, but whether, having done so, he may be compelled to give evidence against himself." In the case at bar appellant had the opportunity, prior to any violation of the law by himself to report the crime of the principals: had he done so he would not have incriminated himself in any way.

CONCLUSION

For the above reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

ANTHONY MICHAEL GLASSMAN,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Anthony Michael Glassman
ANTHONY MICHAEL GLASSMAN

No. 21556

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE HERMAN and VICTOR HERMAN,

Appellants,

vs.

EAGLE STAR INSURANCE COMPANY, LTD., *et al.*,

Appellees.

APPELLANTS' OPENING BRIEF.

JAFFE, OSTERMAN & SOLL,
6380 Wilshire Boulevard,
Suite 900,
Los Angeles, Calif. 90048,
Attorneys for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Statute

Textbooks

No. 21556

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE HERMAN and VICTOR HERMAN,

Appellants,

vs.

EAGLE STAR INSURANCE COMPANY, LTD., *et al.,*

Appellees.

APPELLANTS' OPENING BRIEF.

Prefatory Statement.

Appellants Lee Herman and Victor Herman appeal from an adverse judgment in favor of respondent insurance companies following a trial on appellants' claim for payment for the loss of a $35,000.00 diamond ring under certain policies of insurance issued by the respondent companies. The District Court had jurisdiction on the basis of diversity of citizenship. It is the contention of the appellants that they were denied a fair trial by the trial court in that the trial court admitted, over appellants' objection, certain evidence of polygraph examinations which were conducted upon appellant Lee Herman. It is submitted that the admission of the polygraph evidence was in violation of appellant's constitutional rights to due process and a fair trial and constituted prejudicial error on the basis of which the judgment should be reversed and a new trial ordered.

Polygraph Evidence Is Inadmissible Under California Law.

In support of the admission of the evidence concerning the polygraph of Appellant Lee Herman, the Respondents cited to the Trial Court and relied upon the case of *People v. Houser* (1948), 85 Cal. App. 2d 686, 193 P. 2d 937. It is Appellants' contention that this case is unique in its factual situation and represents a grievous departure from the clear law in California concerning the admissibility of polygraph evidence. It is further submitted that to extend this case beyond its present scope would be a dangerous and unwarranted invasion of the constitutional rights of litigants.

At the risk of prolixity, it is felt that the leading cases concerning polygraph evidence should be reviewed so that this Court may be apprised of the language used by the California courts in demonstrating their attitude toward polygraph evidence in criminal and civil matters.

Polygraph Evidence in Criminal Cases.

People v. Houser (1948), 85 Cal. App. 2d 686, 193 P. 2d 937. This case involved the prosecution and conviction of the Defendant for lewd and lascivious conduct upon the body of an eight year old girl. Defendant appealed on several grounds, one of which was error in the admission of the results of a polygraph test. That portion of the opinion relating to the polygraph is as follows:

> "The next point involves the testimony pertaining to the lie detector test. It is claimed that such evidence has no evidentiary value and that such class of evidence is not regarded by the courts

and therefore it was improperly admitted. It appears from the *written stipulation signed by defendant and his counsel,* that the operator thereof, Mr. Riedel, is an expert operator and also an expert in interpreting results of such tests. It was likewise stipulated that such evidence, i.e., 'the questions propounded by said operator and the answers given by said defendant and the recordings of said defendant's reactions thereto and everything appertaining to said test and the entire results of said tests including the opinions of said operator be received in evidence on behalf of the people or on behalf of the defendant . . .' and that 'said defendant hereby waives his constitutional privilege against self-incrimination to the extent that the same may be involved in the presentation in evidence of the foregoing matters.' It would be difficult to hold that defendant should now be permitted on this appeal to take advantage of any claim that such operator was not an expert and that as to the results of the test such evidence was inadmissible, merely because it happened to indicate that he was not telling the truth when he denied to the officers that he took the girl to the orange orchard and committed the acts alleged upon her." (85 Cal. App. 2d 686 at 694, 695, Emphasis added).

Diligent research has failed to disclose any other case in California wherein evidence of a polygraph examination has been admitted. The *Houser* case is unique and is inconsistent with the clear line of California authorities which later established the rule against the admissibility of polygraph evidence. In ad-

dition, the *Houser* case is the only case which we have found where there was a "stipulation" signed by the party *and* his attorney and in which the stipulation provided all of the following:

1. That the operator was an expert and also an expert in interpreting the results of the test;
2. That the results of the test could be received in evidence on behalf of Plaintiff or Defendant;
3. That the Defendant waived his constitutional privilege against self-incrimination.

In its opinion, the court states that

> "It would be difficult to hold that the Defendant should *now* be permitted on this appeal to take advantage of any claim that such operator was not an expert and that as to the results of the test such evidence was inadmissible." (Emphasis added.)

This language suggests that the Defendant's first objection to the admissibility of the evidence was made on the appeal and that there was no objection to the evidence at the time of trial, as there was in the instant case. This is the same interpretation that was placed on the *Houser* case when it was considered by the court two years later in *People v. Wochnick.*

People v. Wochnick (1950), 98 Cal. App. 2d 124, 219 P. 2d 70. This can be described as a leading case in California and was apparently the first case to consider the admissibility of lie detector evidence in the absence of a stipulation. This was an appeal from a murder conviction. The District Court of Appeal reversed the conviction on the ground that the results of a lie detector test performed on the Defendant were im-

properly placed before the jury in the guise of relating a conversation between the Defendant and a witness concerning the results of the test. In reversing, the court held that the admission into evidence of the results of the test constituted prejudicial error.

The language of the decision concerning the admissibility of polygraph evidence is as follows:

> "The question of the admissibility in evidence of the results of the polygraph or so-called lie detector test has not been decided in this State. In the case of *People vs. Houser,* 85 Cal.App.2d 868 [193 P.2d 937], such evidence was admitted pursuant to a *signed stipulation* and the court stated that the defendant could not *on appeal* assert that the results of the test were inadmissible in evidence. In other jurisdictions the courts, with but one exception (*People vs. Kenny,* 167 Misc. 51 [3 N.Y. 2d 348]. which was not appealed), have uniformly sustained the trial court's rulings in refusing to admit evidence of such examination. In *Frye vs. United States,* 293 F. 1013 [54 App. D.C. 46], *State vs. Bohner,* 210 Wis. 651 [246 N.W. 314; 86 A.L.R. 611], *People vs. Forte,* 279 N.Y. 204 [18 N.E. 2d 31, 119 A.L.R. 1198], and *People vs. Becker,* 300 Mich. 562 [2 N.W. 2d 503, 139 A.L.R. 1171], the defendants sought to introduce in their own behalf evidence of lie detector tests. The courts in these cases all held there was not sufficient scientific recognition of the efficacy of the machine to warrant the judicial acceptance of its recordings as evidence. In *State vs. Cole,* 354 Mo. 181 [188 S.W. 2d 541], a motion was made by defendant that the lie detector

machine be used in testing the truth of all witnesses. The court stated that while no doubt the lie detector is useful in the investigation of crime and may point to evidence which is competent, it has no place in a courtroom." (Emphasis added.)

"In *State vs. Lowry,* 173 Kan. 622 [185 P.2d 147], following a first trial, the court suggested to both the complaining witness and the defendant that they submit to a lie detector test before the second trial. The test was submitted to by both parties but there was no agreement that the results might be used as evidence. The outcome of the test was admitted at the second trial over the defendant's objection and on appeal the court stated (p. 151) [185 P.2d]: 'We are not ready to say that the lie detector has attained such scientific and psychological accuracy, nor its operators such sureness of interpretation of figures on a dial that the testimony here in question was competent, over objection, for submission to a jury holding the fate of the defendants in its hands . . . The conclusion here reached is in line with the almost unanimous holding of other courts and with the conclusions of law writers generally.' "

"We are in accord with the views expressed in the foregoing cases that 'the systolic blood pressure deception test for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as justify the admission of expert testimony deduced from tests made under such theory.' " (98 Cal. App. 2d at pp. 127, 128).

Note in the court's reference to *People v. Houser,* the court distinguishes it as a case wherein there was

a *stipulation* and that the Defendant could not raise the objection to the admissibility of the polygraph evidence for the first time on appeal. This suggests that if the Defendant in *Houser* had objected to the evidence at the time of trial the result would have been different.

People v. Carter (1957), 48 Cal. 2d 737, 312 P. 2d 665. This was a conviction of murder in the first degree imposing the death penalty which was reversed by the California Supreme Court. One of the basis for the reversal was the trial court's error in failing to exclude a statement by a witness to the effect that he had been willing to take a lie detector test but "some other people wouldn't take [such a test] . . ." The court held that notwithstanding the fact that this testimony was stricken,

> "the implication survived that the Defendant had refused to take a lie detector test and that his refusal furnished some evidence of guilty knowledge. *Lie detector tests do not as yet have enough reliability to justify the admission of expert testimony based on their results* (citations)." (Emphasis added.)

This appears to be the first California Supreme Court case to pass on the question of reliability of lie detector tests and their admissibility in evidence and can be considered the leading case. Numerous cases have followed the *Carter* case with regard to the general rule stated by the court that lie detector tests are inadmissible because they are unreliable and also the general rule that the agreement or the refusal to take a lie detector test is likewise inadmissible because the results of the test would have been admissible and therefore no inference can be raised from the agreement or

refusal to take the test. It is worthy of note that the California Supreme Court considered polygraph evidence so scientifically unsound that even an oblique reference to the test, such as in the *Carter* case was prejudicial and reversible error.

People v. Aragon (1957), 154 Cal. App. 2d 646, 316 P. 2d 370. This was a prosecution for bribery in connection with a boxing event. The District Attorney, in his opening statement and during his examination of witnesses, attempted to introduce the results of a lie detector examination previously given to the Defendant. The Defendant had voluntarily taken the test at the request of the Texas Boxing Commission before any criminal prosecution had begun. The Prosecutor did not offer the test itself but merely offered conversations concerning the test between the witness and the Defendant. The court in reversing the conviction held that

> "the statements with reference to the lie detector test as introduced in this case were highly prejudicial and in our opinion constituted prejudicial error." (154 Cal. App. 2d at p. 659).

In considering the admissibility of lie detector evidence the court stated as follows:

> "In the instant case there is nothing before us to establish what kind of lie detector test was given, if any; there is nothing concerning the accuracy of such a test; there is no showing that the tests, even if properly given, have achieved scientific recognition in this State; there is no foundation for the admission of any test results; and there is no *stipulation* that the testimony could be received in evidence. It is not at all unlikely that a popular

> belief has been formed from press, radio, television, stage and screen that the lie detector is an accomplishment of modern science, the results of which are as reliable as those of fingerprinting, blood tests and ballistics. However, this is not correct. It is general knowledge among those familiar with the lie detector machines that the results are greatly dependent upon the training, experience and skill of the operators and that the results vary with different types of subjects. . . .
>
> "It may well be that the lie detector is of use in the field of criminal investigations and for some other purposes, but we know of no appellate decisions sustaining its use in the trial of a criminal case in the absence of a *stipulation.*" (Emphasis added).

The court cited the *Wochnick* and the *Carter* case as authority for its decision.

People v. Jones (1959), 52 Cal. 2d 636, 343 P. 2d 577. This case was an appeal from a death penalty murder conviction. One of the errors assigned by the Defendant was that the court refused to admit into evidence the results of a test conducted upon Defendant under sodium pentothal (truth serum). The court affirmed the conviction and with regard to this specific assignment of error, the court held that there was no error for two reasons. First, that there was no proper offer of proof made to the court concerning the evidence proposed to be introduced about the truth serum test, and, more important,

> "the result of such a test is not admissible in a criminal case. The courts have consistently held that whether the test is a *polygraph test,* or a sodium

> amytal or sodium pentothal test, the results are not such as to be admissible for or against the Defendant because of a lack of scientific certainty about the results. (Numerous citations) These tests do not scientifically prove the truth or falsity of the answers given during such tests." (52 Cal.2d at p. 653, Emphasis added.)

People v. York (1959), 174 Cal. App. 2d 305, 344 P. 2d 811. This is an appeal from conviction of murder in the first degree. One of the assignments of error was the refusal of the court to permit the Defendant to qualify a polygraph expert who would testify relative to the results of a polygraph examination taken by the Defendant.

In affirming the conviction, the Appellate Court cited with approval the *Carter* case which held "lie detector tests do not as yet have enough reliability to justify the admission of expert testimony based on their results", and the *Jones* case which held

> "the courts have consistently held that whether the test is a polygraph test or a sodium amytal test or a sodium pentothal test, the results are not such as to be admissible for or against the Defendants because of a lack of scientific certainty about the results."

This decision was in the Fourth Appellate District which is the same one that decided the *Houser* case.

Polygraph Evidence in Civil Cases.

The question of the admissibility of polygraph evidence in a civil case has been rare in the State of California. The first, and apparently the only, case in which it has been directly considered is *Gideon v. Gid-*

eon (1957), 153 Cal. App. 2d 541, 314 P. 2d 1011. This was a divorce action wherein the Defendant husband appealed from a judgment for the wife and in connection therewith Defendant asserted that the court should have considered lie detector evidence offered by him to show that the Defendant was telling the truth regarding his charges of fraud in proceedings. The court stated

> "these statements were conclusions only, prove nothing, and, as will later appear in this opinion, *the lie detector tests are worthless.*" (153 Cal. App. 2d at p. 545, Emphasis added.)

With reference to the polygraph evidence, the court said:

> "Finally with reference to Mr. Gideon's contention that lie detector tests support his statement that there was fraud and perjury. In his arguments to this court, he says that there was fraud and perjury and in his affidavit he avers that there was. Then he argues that when he submitted the statements and averments to a lie detector expert, the expert said that they were true.
>
> "This is, of course, unstable and illogical reasoning. Lie detector tests have no place in California law. In *People vs. Carter* (citation) our Supreme Court says: 'Lie detector tests do not as yet have enough reliability to justify the admission of expert testimony based on their results.'
>
> "In the opinion of this court, use of lie detectors would add a dangerous refinement to our trial practice. For then each witness in a case could go to a lie detector expert and repeat his testimony. Then the expert could testify that that wit-

> ness' testimony was true when tested by the lie detector and then the Judge or the jury charged with finding the truth could be confounded by as many lie detector opinions as to whether or not witnesses who gave conflicting testimony told the truth as there were conflicts.
>
> "One of the primary functions of our trial courts, to find and declare the truth, would then be like flotsam caught in a whirling eddy, go round and round and get nowhere." (153 Cal. App. 2d at pp. 546-547).

McCain v. Sheridan (1958), 160 Cal. App. 2d 174, 324 P. 2d 923. This was a petition for reinstatement by a police officer who had been dismissed from the force for his refusal to take a lie detector test. There had been a shortage in the cash bail fund and 17 employees of the police department had control of this fund. By a petition to the police chief, all 17 of these employees stated that they were subject to adverse publicity and that they were suspected of appropriating the missing funds and all of them urged "that a full scale investigation, including the use of latest scientific aids, be employed at once in an earnest effort to establish the innocence or guilt, of each of the undersigned." The petitioner was one of the signers of this document and when he presented the petition to one of his fellow officers, he stated that the petition was a request that the signers be given a lie detector test. Upon receipt of the petition, the police chief arranged with an expert for the giving of a lie detector test. Later the petitioner took the lie detector test and when he was advised that it showed that he had been false in his statements, the petitioner asked to leave and re-

fused to submit to any further testing. Later the police chief ordered him to complete the poligraph test and offered to arrange the test by another examiner. This, the petitioner refused and he was dismissed for failing to comply with this last order of the chief of police.

The question on the appeal was whether the petitioner's refusal to comply with the chief's order to complete the polygraph test constituted insubordination and disobedience. The Appellant argued that the order to take the test was unreasonable and invalid because the results of the test could not be admissible in evidence for or against the Appellant. In this connection, the Appeal Court said:

> "Beyond question, the results of lie detector tests are inadmissible in evidence on the trial of a criminal case, whether offered by the prosecution (citations) or the defense (citations). *Nor are such results admissible on trial of a civil case.* (citing *Gideon vs. Gideon*). Similarly, a suspects' willingness or unwillingness to take such a test is inadmissible at trial (citing *People vs. Carter*)." (160 Cal. App. 2d 174, 177, Emphasis added.)

The court affirmed the judgment holding:

> "By his written request that the test be administered to him, Appellant evinced desire to obtain whatever benefits such apparent willingness might yield in diverting the investigation to others. The order that he complete the test he had himself requested, seems in no way an unreasonable departmental regulation. Such tests are recognized as having some value in investigation, even though they are not yet sufficiently reliable to be admitted into evidence." (*Ibid*)

Although the admissibility of polygraph evidence was not directly in issue, the above quoted language strongly suggests the court's opinion that, notwithstanding the fact that the petitioner had agreed to take the test and in fact invited it, the test was still inadmissible in evidence in a civil action.

Frazee v. Civil Service Board (1959), 170 Cal. App. 2d 333, 338 P. 2d 943. This case is similar to the *McCain* case in that it is a petition to compel the reinstatement of a police officer who was discharged for refusing to take a lie detector examination.

The Appellant police officer contended that inasmuch as the results of polygraph tests are inadmissible in evidence, to submit to one would be an idle act and therefore the chief acted arbitrarily and unreasonably in requiring him to take such a test.

The court reaffirmed the holding of *People v. Carter* to the effect that "lie detector tests do not as yet have enough reliability to justify the admission of expert testimony based on their results". However, the court followed the *McCain* case and held that even though the tests are inadmissible, a police officer because of his position of trust and confidence in the community should not decline to take such a test when it is requested and therefore his discharge was proper.

Fichera v. State Personnel Board (1963), 217 Cal. App. 2d 613, 32 Cal. Rptr. 159. This was an appeal from a refusal to reinstate a California State police officer who was discharged for refusing to take a polygraph test. The court relied on the *McCain* and *Frazee* cases for the proposition that police officers are in a unique position and therefore should not re-

fuse to have their polygraphs taken. The court in commenting on the *McCain* case referred to the fact that the officer in that case had at first asked for the test and later refused to obey an order to take it but the *Fichera* court indicated that there was no element of estoppel in the *McCain* case. In other words, the Appellant's agreement to take the test did not estop him from claiming it was still inadmissible in evidence and the court acknowledged that it was still inadmissible. There is no mention of the *Houser* case in the decision in the *McCain* case or in the decision in *Fichera* to the effect that McCain's agreement to take the polygraph would have made it admissible and for that reason his refusal to take the test was unjustified.

In the *Fichera* case the Appellants argued that the *McCain* and *Frazee* cases should be abandoned because they constitute a dangerous intrusion on the privacy of individuals by forcing the taking of polygraph tests and that the tests are unreliable. With regard to the question of reliability, the court stated as follows:

> "It may be conceded that there is a considerable degree of fallibility with the polygraph (citation). It is not considered to have enough reliability to justify the admission of expert testimony in the courts based on its results and a person's willingness or unwillingness to take the test is without enough probative value to justify its admission. (citing People vs. Carter)" (217 Cal. App. 2d 613, 622).

The court goes on to state that as an investigative tool, it may have some value and the justification, in this case as in *McCain* and *Frazee,* is that the Appel-

lants were not entitled to withhold this means of investigation and at the same time retain their positions as officers of the California State Police.

Cases From Other Jurisdictions.

There is a dearth of authorities relating to polygraph evidence in other jurisdictions. These have been collated in 23 A.L.R. 2d, 1306-1311 and the supplements thereto. These cases are summarized below:

State v. Lowry (1947), 163 Kan. 622, 185 P. 2d 147. In the *Lowry* case it was held that the admission of the results of a lie detector test over Defendant's objection was error even though the test had been suggested by the trial court and *agreed to by both the prosecuting witness and the defendant,* the court reasoning:

> "There is no persuasive analogy here with such tests as fingerprinting which have a strictly physical basis, clearly demonstrable. It is not contended that the lie detector measures or weighs the important psychological factors. Many innocent but highly sensitive persons would undoubtedly show unfavorable physical reactions, while many guilty persons, of hardened or less sensitive spirits would register no physical indication of falsification. This the trained operators of course understand and proceed upon the basis of a large percentage of error. But it seems quite too subtle a task of evaluation to impose upon a untrained jury." (This case was cited by the Court in *People vs. Wochnick, supra.*)

Stone v. Earp (1951), 331 Mich. 606, 50 N.W. 2d 172. The Michigan Supreme Court ruled that lie detector evidence was inadmissible in a *civil action* by

reason of the fact that the tests were still in the experimental stage. The Court held that neither *consent of the parties* to take the tests nor the trial court's direction that the parties submit to the tests, served to render the evidence competent.

State v. Tremble (1961), 68 N.M. 406, 362 P. 2d 788. The court held that evidence of a lie detector test was inadmissible over the Defendant's objection in this prosecution for incest even though the Defendant had signed a waiver *agreeing* to take the test and be bound by the results thereof.

LeFevere v. The State (1943), 242 Wis. 416, 8 N.W. 2d 288. The Defendant in a murder prosecution voluntarily submitted to a series of lie detector tests under a *stipulation* with the District Attorney which provided that the results of the test might be admitted in any trial or proceeding. At the trial the findings of the lie detector operators which were favorable to the defendant were excluded on objection by the State and the Supreme Court of Wisconsin held that the exclusion was proper, notwithstanding the stipulation.

People v. Zazzetta (1963), 27 Ill. 2d 302, 189 N.E. 2d 260. The court held that the results of a lie detector test, although taken pursuant to Defendant's *stipulation* permitting admission of such results in evidence, was inadmissible where the stipulation was made orally by the Defendant, a man with an eighth grade education, appearing before the court prior to trial without counsel, and on trial no evidence was introduced regarding the method of testing or the qualification of the operator and the expert was not available for cross-examination.

State v. Valdez (1962), 91 Ariz. 274, 371 P. 2d 894. The court held that polygraphs and expert testimony relating thereto are, subject to certain qualifications, admissible upon *stipulation* in criminal cases, to corroborate other evidence of Defendant's participation in the crime charged or to corroborate or impeach his own testimony if he takes the stand.

In the cases of *State v. Lowry, Stone v. Earp* and *State v. Tremble,* the parties had agreed to take the test but there was no specific stipulation for it to be admitted into evidence, although in the *Tremble* case the Defendant had agreed to be bound by the results. In all of these cases the evidence was excluded. In the cases of *LeFevere v. The State* and *People v. Zazzetta,* there were express stipulations permitting the results to go into evidence and the court excluded the polygraph evidence upon objection at the time of the trial. In the case of *State v. Valdez,* the court held that the polygraph evidence would be admissible upon *stipulation* but only for the limited purposes set forth therein.

Summary.

Although numerous cases have dealt with polygraph evidence in the nearly twenty years since the *Houser* case, diligent research has failed to disclose a single case in California or otherwise that has followed the *Houser* case. It is submitted that the facts of that case were unique with regard to the stipulation signed by both the Defendant *and his attorney* and also the aggravated nature of the crime against the child of tender years. It would be unwarranted and dangerous to extend the questionable "rule" of the *Houser* case into other cases where the facts do not clearly and

unequivocally bring themselves within the scope of the *Houser* decision. Namely, a stipulation by the party, signed by his attorney for the taking of the polygraph test, the acknowledgement of the expertice of the operator, the express agreement for admission of the test in evidence and the waiver of the constitutional privilege which would otherwise be violated by the admission of this evidence. In the absence of such stipulation, the protection of a party's constitutional guarantees to a fair trial would be as fragile as the individual party's resistence to his opponent's suggestion that the test be taken. Without the advice of competent counsel concerning the rights which the party would be waiving, the courts should not and have not permitted polygraph evidence to be admitted—and the only way the attorney's advice and consent can properly be demonstrated is by his signature on a stipulation or in open court in the manner prescribed by law. Where such a basic rule of evidence is being waived, the courts should zealously protect the uninformed and naive litigant.

Polygraph Agreements [Exhibits C and D] Are Not Binding Upon Appellants nor Valid to Permit the Admission of the Polygraph Evidence.

The Polygraph Agreements Were Signed by Appellants Without the Advice of Counsel.

At the trial of the instant case evidence of the polygraph examination of appellant Lee Herman was introduced by respondents over appellants' objection. This objection was overruled by the trial court

> "on the grounds that there is a *stipulation* that allows this into evidence. I am allowing it pursuant to that *stipulation.*

"I understand the rule of law if there is no stipulation, but under the stipulation I am allowing it over the objection.

Objection overruled." [Rep. Tr. p. 331, lines 9-15 (emphasis added)]

Prior to the objection raised to the specific evidence on the polygraph there had been a general objection lodged to the line of questioning concerning any polygraph evidence and this was the subject of a lengthy discussion between the court and counsel out of the hearing of the jury [Rep. Tr. pp. 235-277]. This conference with the court was for the purpose of evaluating the validity, in the court's mind, of the polygraph agreements [Exs. "C" and "D"]. During the course of these discussions there were unsworn representations made by respondents' counsel, Mr. James White, concerning the circumstances under which the polygraph agreements were executed by the appellants. The appellants represented to the court that the polygraph agreements were both signed on November 11, 1964, at the request of Mr. White who was then acting as attorney for the respondents. This was at a time prior to the filing of the instant action and prior to the time when the appellants were represented by counsel. Respondents contended through their counsel that the polygraph agreement relating to Lee Herman [Ex. "C"] was executed by Lee Herman on April 22, 1965, at a time when she was then represented by counsel and that Exhibit C was executed in the presence of attorney Arnold Shane, an associate of attorney Charles J. Katz, who was then the appellants' attorney of record. In considering whether there had been a validly executed stipulation for the admission of the polygraph

evidence, the trial court was presented with the sworn testimony of Lee Herman to the effect that the polygraph agreement [Ex. "C"] was executed by her on November 11, 1964, and that on April 22, 1965 she did not sign anything [Rep. Tr. p. 271, line 10, to p. 274, line 6]. In addition the court was presented with the sworn affidavit of attorney Arnold Shane [Clk. Tr. pp. 58-59] in which he states that at the time that he appeared at the Herman's residence on April 22, 1965, Mr. White, the attorney for respondents, produced from his brief case the polygraph agreement [Ex. "C"] already signed by Lee Herman.

By way of rebuttal to this sworn testimony of Lee Herman and Arnold Shane, respondents offered only the sworn testimony of the polygraph examiner, Kenneth W. Scarce [Rep. Tr. p. 259, line 19, to p. 268, line 23]. During the course of this testimony, the court asked Mr. Scarce if he knew when Mrs. Herman had signed the Exhibit "C" and Mr. Scarce indicated that he did not know [Rep. Tr. p. 268, lines 17-23]. It is submitted, that on the state of the record of sworn testimony before the trial court, both by oral testimony and affidavit, there was no evidence in the record that would permit a finding by the trial court that the polygraph agreement [Ex. "C"] was signed by Mrs. Herman on April 22, 1965, but the only evidence that was in the record indicated that it was signed by her on November 11, 1964.

In his argument in support of the admissibility of the polygraph evidence, respondents' counsel asserted that at the time the polygraph examination was given to Mrs. Herman on April 22, 1965, counsel for the respondent insurance companies requested attorney Ar-

nold Shane to sign the polygraph agreement but Mr. Shane refused to do so [Rep. Tr. p. 235a, lines 2-7]. It is submitted that even if respondents' version of the signing of the polygraph agreement [Ex. "C"] is true and the agreement was signed by appellant Lee Herman on April 22, 1965, which fact appellants strenuously deny, then the fact that respondent's counsel asked Mr. Shane to sign the agreement acknowledges respondents' appreciation of the fact that the polygraph evidence should not be admitted without a stipulation by the opposing parties' attorney. There is no question that an attorney who has knowledge of a party being represented by another attorney cannot deal with that party directly but must deal with her counsel. For this reason an agreement extracted from Mrs. Herman without the consent of her counsel would be improper and would not be binding on Mrs. Herman. At the time respondents' counsel requested Mr. Shane to sign the stipulation or agreement regarding the polygraph, respondents' counsel indicated that Mr. Shane refused to do so because he was new in the case. At that point it was incumbent upon respondents' counsel to refrain from further proceeding or attempting to have Mrs. Herman sign the agreement but rather to obtain the signature of Mrs. Herman's attorney of record, Charles J. Katz. The reason respondents' counsel never sought or obtained Mr. Katz' agreement to admit the polygraph evidence is because he knew that no competent attorney would have given him such a stipulation.

Further evidence that the Herman's attorneys had never agreed to the admission of the polygraph evidence is the fact that appellants' objection to the ad-

missibility of that evidence was expressly preserved in the pre-trial order [Clk. Tr. p. 31, lines 4-14]. If appellants had agreed or stipulated to the admission of this evidence, they would not have reserved this objection nor would respondents have permitted such a reservation.

There Was No Valid Stipulation to Admit the Polygraph Evidence.

As indicated above, appellants assert that there is no evidence in the record that would support the finding by the trial court that the polygraph agreement [Ex. "C"] was signed by Lee Herman on April 22, 1965, as opposed to November 11, 1964. However, even if the trial court were justified in assuming that Exhibit "C" was signed on April 22, 1965, the signature at that time by appellant Lee Herman would have no binding effect upon her in the law suit that was then proceeding. Mr. Shane's presence at the time of such signing or his notations on Exhibit C would not bind the appellants.

> "An attorney and counsellor shall have authority:
>
> 1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court and not otherwise. . . ."
>
> *Code of Civil Procedure,* Section 283.

A stipulation which does not appear to have been filed or entered in the minutes of the court below, as required by the Code of Civil Procedure, Section 283, cannot be recognized by the Appellate Court.

> *Hoopes v. Superior Court* (1925), 71 Cal. App. 564, 235 Pac. 739.

In the absence of such a stipulation by Mrs. Herman's attorney of Record, the agreement or stipulation concerning the polygraphs which was obtained, according to the respondents, *after* the commencement of the action, would be invalid and not binding upon appellant Lee Herman.

Where a Party Is Represented by an Attorney of Record, the Party Cannot Enter Into a Stipulation Affecting the Conduct of the Action.

It is settled that the attorney of record has the exclusive right to appear in court for his client and to control the court proceedings, so that neither the party himself nor another attorney can be recognized by the court in the conduct or disposition of the case. (*Wells Fargo & Co. v. City of San Francisco* (1944), 25 Cal. 2d 37, 42-43, 152 P. 2d 625.)

It is the settled law of this State that while a party to an action may appear in his own proper person or by an attorney, he cannot do both, and that as long as he has an attorney of record in an action, the court cannot recognize any other as having management or control of the action, *and the party can act only through his attorney.* (Emphasis added). (*Boca and Loyalton Railroad v. Superior Court* (1907), 150 Cal. 153 at 155-156, 88 Pac. 718.)

> "While there is an attorney of record, no *stipulation* as to the conduct or disposal of the action should be entertained by the court unless the same is *signed or assented to by such attorney.* Such a rule is not only indispensable to the orderly conduct of a cause, but is likewise a safeguard to the client against the intrigues of his adversary." (*Boca and Loyalton Railroad v. Superior Court* (1907), 150 Cal. 153 at 155-156, 88 Pac. 718.)

If a party has an attorney of record, a stipulation relating to the conduct or disposal of an action is *ineffectual* unless signed or assented to *by the attorney* (46 Cal. Jur. 2d, Stipulations, Section 3, page 8 and cases cited).

The attorney of record has the exclusive right to appear in court for his client and neither the party himself nor another attorney should be recognized by the court in the conduct or the disposition of the case (*Epley v. Califro* (1958), 49 Cal. 2d 849, 854, 323 P. 2d 91).

In the instant case the trial court characterized Exhibit "C" as a "stipulation" and said stipulation was the basis for the court's overruling appellant's objection to the admission of any polygraph evidence [Rep. Tr. p. 331, lines 9-15]. It is submitted that there is no basis in the present record for the court's finding that there was a stipulation. Such a finding constitutes an abuse of discretion by the trial court in that there is no evidence of a stipulation in the record. There is no question that at the time the polygraph examination was given on April 22, 1965, the instant law suit had been filed and appellants were represented by attorney Charles J. Katz, their attorney of record. This is acknowledged by respondents' counsel in his statements to the court [Rep. Tr. p. 235, lines 13-18]. A review of Exhibit "C", the polygraph agreement signed by Lee Herman, demonstrates that it was never signed by attorney Charles J. Katz, the attorney of record for the appellants. Therefore, under the foregoing authorities,

Exhibit "C" cannot constitute a stipulation even if it were signed by Lee Herman on April 22, 1965, as urged by respondents. Under the foregoing authorities the trial court was obligated to disregard such a "stipulation" signed by the party when the stipulation had not been signed or assented to by the attorney of record. The record indicates that the attorney of record for appellants was not even in attendance at the time the polygraph examination on April 22, 1965, but instead an associate of the attorney of record, Arnold Shane, was in attendance, and when requested by respondents' counsel, he refused to sign the stipulation [Rep. Tr. p. 235a, lines 2-7].

Contrary to he unsworn statements of respondents' attorney to trial court, it is most illogical that attorney Shane would have refused to have signed the polygraph agreement and yet permit Mrs. Herman so to do. More logical is Mrs. Herman's and attorney Shane's sworn statement to the trial court that Exhibit "C" was signed by Mrs. Herman prior to April 22, 1965, namely on November 11, 1964, when respondents' attorneys secured the agreement from them at their home, at a time when they were not represented by counsel.

There Was No Proper Foundation for the Admissibility of the Polygraph Evidence.

As noted above, the trial court admitted the polygraph evidence on the basis of what the court found to be a "stipulation" by appellant Lee Herman. Appellants are not asking this Court to "weigh" evidence

before the trial court concerning the so-called stipulation. It is submitted that there was *no evidence* in the record to sustain such a finding. The only evidence of the so-called stipulation was Exhibit "C" itself, which was not signed by the attorney of record for appellant Lee Herman, the sworn testimony of Lee Herman and the sworn affidavit of Arnold Shane, both of which assert that the so-called stipulation was not signed on April 22, 1965, but it was in fact signed prior to that date and at a time when appellants were not represented by counsel. The only language in the record before the trial court that contradicts this is the unsworn statement of respondents' counsel and it is axiomatic that statements of counsel are not evidence.

Accordingly, it is submitted that there is no evidence in the record upon which the court could have based a finding of fact that there was a stipulation signed by appellant Lee Herman and her attorney of record which would be binding upon appellant at the time of trial nor was there any evidence in the record to justify a finding on the part of the trial court that Exhibit "C" was signed after the commencement of the action.

If Exhibit "C" was signed before the Commencement of the action then it is clearly not a stipulation. If Exhibit "C" was signed after the commencement of the action but without the assent of appellants' attorney of record, then under the cases cited it is not a binding stipulation. In either case the Exhibit "C" cannot result in the admissibility of the polygraph evidence under the so-called "rule" of the *Houser* case and such evidence should have been excluded by the trial court.

Conclusion.

Based on the foregoing Points and Authorities, it is submitted that polygraph evidence is so disfavored by the California courts, as well as the courts of other jurisdictions, that in order to permit its introduction in evidence, there must be clear and unequivocal evidence of a valid stipulation. Appellants contend that the *Houser* case is "bad law" and that at the very best should be restricted to the narrow confines of its decision. Appellants consider it to be a dangerous case from a Constitutional and fair trial point of view and urge that there was no evidence presented to the Trial Court that would justify the application of the *Houser* decision to the instant case.

The circumstances surrounding the execution of the polygraph agreement Exhibits C and D are so equivocal and so suspicious that it was error for the court to permit the introduction of the polygraph evidence. There is no question that before the instant lawsuit was filed and before the Appellants were represented by counsel, the Respondent insurance companies sent out their attorney to secure this agreement from the Appellants by which they waived an important right, without which they could not hope to obtain a fair trial. By this technique the insurance company Respondents improperly obtained the consent of the Appellants to be bound by the results of a questionable test, conducted by a person who was not stipulated by the parties to have been qualified and who was to be the sole judge as to the interpretation of the test, which test was given under circumstances which the insurance companies' own witness admits were sub-standard [Rep. Tr. p. 381, line 22, to p. 383, line 14].

It is submitted that the insurance companies set appellants up in an artful and rather devious trap. Because of their good faith and their willingness to cooperate, the Appellants were placed in a position where the Respondent insurance companies could annihilate their legitimate claim by having the Appellants bound to accept the testimony of the insurance companies' man, conducting the insurance companies' test, under the insurance companies' circumstances and for the insurance companies' benefit. This is not consistent with our idea of a "fair trial". It stretches credibility to the breaking point to think that in connection with the defense of a $35,000.00 claim, where there was no evidence of any impropriety in the claim except the polygraph examination, that the insurance companies would treat the Appellants with candor and fairness. The Respondents in this case have unfairly and improperly gained an advantage over the Appellants, the result of which has saved the insurance companies from paying a $35,000.00 claim as to which there was no legitimate defense. The defense of this case was conducted by insult and innuendo and there was no credible evidence that would justify the defense verdict.

It is submitted that the Court should Reverse the Judgment and grant the Appellants a new trial.

Respectfully submitted,

JAFFE, OSTERMAN & SOLL,
By ARTHUR SOLL,
Attorneys for Plaintiffs, Lee Herman and Victor Herman.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ARTHUR SOLL

No. 21556

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE HERMAN and VICTOR HERMAN,

Appellants,

vs.

EAGLE STAR INSURANCE COMPANY, LTD., *et al.*,

Appellees.

APPELLEES' BRIEF.

CUMMINS, WHITE & BREIDENBACH,
900 Wilshire Boulevard,
Suite 1204—Statler Center,
Los Angeles, Calif. 90017,
Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX TO APPELLEES' BRIEF

AUTHORITIES TO APPELLEES' BRIEF

AUTHORITIES TO APPENDIX A

No. 21556

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE HERMAN and VICTOR HERMAN,

Appellants,

vs.

EAGLE STAR INSURANCE COMPANY, LTD., *et al.*,

Appellees.

APPELLEES' BRIEF.

STATEMENT OF THE CASE.

Introduction.

Appellants Lee and Victor Herman have appealed from a judgment entered on a verdict in favor of respondent insurance carrier [Tr. p. 61].[1] The action involved a claimed theft or loss of a $35,000 diamond ring. At the trial the court admitted testimony of Mr. Kenneth Scarce, a polygraph examiner, who testified that he received his training in the Los Angeles Police Department and is employed as a polygraph examiner by the District Attorney's office of Los Angeles County [R. Tr. p. 321], and that he teaches the subject at the Gormac School in Pasadena, California [R. Tr.

---

[1]Tr. refers to transcript of record; R. Tr. refers to reporter's transcript.

p. 322, lines 10-18].[2] He has taken in excess of 1500 polygraphs [R. Tr. p. 322, line 25, to p. 323, line 3].

Based upon his polygraph examination of plaintiff appellant Lee Herman, Mr. Scarce testified that Mrs. Herman

> "* * * was untruthful to the statement that she made concerning the missing ring * * * that she knew the person that had taken the ring, that she had seen him and talked to him since I had given the polygraph examination to Mr. Herman, and that this was—it was a false report." [R. Tr. p. 332, line 25, to p. 333, line 7].

Mr. Scarce further testified that the test indicated that Mrs. Herman testified untruthfully to the question as to whether she had seen the ring since it was reported missing [R. Tr. p. 344, line 1, to p. 345, line 4].

Appellants moved for a new trial claiming that the admission of evidence respecting the polygraph examination was error [Tr. pp. 144-166]. This motion was denied by Judge E. Avery Crary, in accordance with his Memorandum Opinion [Tr. pp. 92-107].

---

[2]Mr. Russ Jones, a polygraph examiner called by appellants indicated the Gormac School is the only one recognized in this area [R. Tr. p. 505, lines 3-6].

ARGUMENT.

Factual Background.

Although appellants appear to raise but one question in their brief (admissibility of polygraph evidence) they have claimed in their brief that there was no other "evidence of any impropriety in the claim" (Appellants' Br. p. 29). Respondents contend to the contrary that the evidence at trial, even absent the polygraph testimony would amply justify the jury's verdict.

Evidence Showing Motive to Make False Claim.

The ring in question was insured for and valued at $35,000 [Tr. p. 27, lines 11-14]. Thus, had there been an obligation under the respondents' insurance policies, the amount of the companies' liability was fixed in that amount (California Insurance Code, Sec. 412).

The evidence presented at court respecting the acqisition of the ring allegedly missing was in striking contrast with that ordinarily to be expected in a regular business transaction, and might be best described as bizarre. Appellants called Fred Braun, a jeweler, who testified that he had appraised the ring at $35,000 [R. Tr. p. 130, lines 3-11; p. 133, lines 9-23]. Mr. Braun admitted that he told the insurance adjuster Reece that the sales price by him to Mrs. Herman was "About thirty-four, 35,000. Thirty-four", but admitted that this statement was erroneous [R. Tr. p. 151, lines 9-16]. His testimony respecting the sales price, absent

the admission mentioned above, was that he sold Mrs. Herman the ring in 1963 for a total of $26,800, of which $25,000 was paid in cash and he took a "trade-in ring" for $1800 [R. Tr. p. 134, lines 3-15].

Although Mr. Braun generally keeps records showing purchases and sales, no ledger entry was made regarding this particular transaction [R. Tr. p. 140, line 21, to p. 141, line 11]. Mr. Braun was required to pay federal excise tax on such sales, but did not do so at the time, but did later [R. Tr. p. 141, lines 12-21]. He testified that the ring was mailed to him from New York, and he paid $22,000 in cash for it [R. Tr. p. 142, lines 9-19]. Braun further testified that in payment for the ring he mailed cash to New York in $100 bills, and got no receipt for the payment [R. Tr. p. 143, line 16, to p. 144, line 25], although most of his jewelry purchases are by check [R. Tr. p. 145, lines 4-6]. Mr. Braun gave the Hermans no invoice respecting the ring [R. Tr. p. 148, line 25, to p. 149, line 2].

Mrs. Herman testified respecting the purchase of the ring that she paid no checks at all to Mr. Braun [R. Tr. p. 213, lines 2-5], but rather, she wrote checks to cash, cashed them and then took the cash over to Braun [R. Tr. p. 213, lines 11-13]. She later testified that she had written a total of $11,000 of checks to cash and got the rest of the cash from her safe deposit box [R. Tr. p. 215, lines 5-10].

The absence of records, and the seeming conspiracy to prevent the existence of records regarding a transaction supposedly involving $26,800 would appear to raise a serious question as to the existence and value of the ring, and as to whether it was really a valuable diamond at all. The discrepancy between the alleged

purchase price of $26,800 and the amount for which the selling jeweler then purportedly valued the ring at $35,000 upon which appraisal the insurance companies based their valued policies, would appear to create the opportunity for a quick profit of $8,200 in the event of a loss payable by the insurers.

Circumstances of Alleged Theft.

Mrs. Lee Herman testified that about five years ago a previous theft of jewelry had occurred and she settled with her insurance company at that time for $1500. Between that time and the claimed loss involved here, she acquired approximately $100,000 worth of jewelry [R. Tr. p. 205, lines 8-24]. The alleged theft or disappearance of the ring involved occurred on September 23, 1964, a Wednesday. According to Mrs. Herman's testimony, she went to her box which contained her jewelry, including the ten-carat diamond ring involved in this loss, on the morning of that day and testified "So I wanted to wear some green jewelry, so I went to the box, and to my best recollection my ring was lying right here" [R. Tr. p. 194, lines 13-15]. At that time, according to Mrs. Herman, there was also present in this particular jewelry box earrings worth about $2,000, a diamond pin worth about $4,000, two diamond bracelets worth approximately $10,000, an emerald diamond ring worth approximately $2,000, a gold bracelet with emeralds and diamonds worth about $4,000, and other various gems [R. Tr. p. 206, line 12, to p. 207, line 16]. Mrs. Herman further elaborated, testifying

> "* * * so to my best recollection now I pulled this little ring out from under here, and I thought that this—my large ring turned over, so I was so sure that ring was in that box." [R. Tr. p. 195, lines 1-4].

On cross-examination Mrs. Herman modified this testimony a bit, stating "I am not going to say I am positive I saw it, but I can just see a vision, and I just think I saw it there" [R. Tr. p. 218, lines 7-8]. However adjuster Miles Reece testified that Mrs. Herman told him

> "* * * that she had definitely seen the ring at 8:30 or 8:45 * * * and this particular wedding ring was in the jewelry box together with the ten-carat diamond ring but underneath the ten-carat ring, so that when she reached into the box and withdrew the wedding band, the ten-carat ring * * * the ring tipped over * * *" [R. Tr. p. 291, lines 8-15].

Mrs. Victoria Sneezer, the Herman maid, testified that she put the ring in the jewelry box Tuesday evening, the night before the alleged disappearance [R. Tr. p. 46, lines 5-11]. She had intended to take it to jeweler Braun and went to get it at about 11 o'clock [R. Tr. p. 59, lines 5-16]. She testified that at that time the ring in question was not there, but all the other jewelry was [R. Tr. p. 69, lines 5-10]. Mrs. Sneezer then called Mrs. Herman by telephone and told her that the ring was not in the box. According to Mrs. Sneezer, Mrs. Herman said "Vicki, look. I saw the ring this morning. It is in the box. It is there." [R. Tr. p. 69, lines 15-16]. Mrs. Sneezer testified that she then took the other jewelry which she was supposed to deliver to jeweler Braun and drover to Mrs. Herman's office, saying to her "Mrs. Herman, the ring isn't there" [R. Tr. p. 69, line 19, to p. 70, line 3]. She testified that Mrs. Herman then said "Vickie it is there, go back and look again but take the jewelry to

Mr. Braun" [R. Tr. p. 70, lines 4-5]. Mrs. Sneezer later testified "* * * she told me, 'Vicki, go back and look,' and she said, 'Call me when you find it.' " [R. Tr. p. 71, lines 21-22]. Upon this subject Mrs. Herman testified that she told Vicki while at the office "* * * look through that box again and let me know if you don't find it" [Rr. Tr. p. 196, lines 1-2]. Mrs. Herman then testified "Well, she hadn't called me all day, so I had no reason to wonder. I thought about it during the day, but she hadn't called, so I felt very—" [R. Tr. p. 196, lines 3-5].

According to Mrs. Herman there was no sign of forcible entry to the house [R. Tr. p. 198, lines 17-19]. She likewise advised adjuster Reece that all doors and windows were locked and that there was no evidence of anyone having entered the home [R. Tr. p. 287, lines 16-17].

According to adjuster Miles Reece, Mrs. Sneezer (the Herman maid), stated that it was almost a phobia with the Hermans to keep all doors and windows locked due to a previous burglary [R. Tr. p. 287, lines 9-13]. At trial, however, Mrs. Sneezer indicated that one of the doors had not been locked and that she had first stated that in the office of attorney Katz [R. Tr. p. 94, line 17, to p. 95, line 4]. At trial she also denied having told anybody that the door was kept tightly locked [R. Tr. p. 95, lines 3-5]. Officer Richard F. Haas interviewed Mrs. Sneezer following the initial investigation. Mrs. Sneezer told him that it was her duty to lock the doors for the night but said nothing about taking any trash out [R. Tr. p. 318, line 5, to p. 319, line 3], and told him nothing about how anyone could have gotten into the house [R. Tr. p. 415, lines 7-9]. Mrs.

Herman likewise told Officer Haas according to the officer's testimony that "she didn't know how anyone could have gotten in the house" [R. Tr. p. 415, line 17].

In her pre-trial deposition Mrs. Herman testified as follows:

> "Q. Had you at any time before this ring was discovered to be missing told your husband in substance or effect that if his attitude continued, that desperate steps would have to be taken? A. His attitude about what?
>
> Q. About anything. A. No, sir.
>
> Q. Had you told Vicki to tell your husband anything of that sort? A. Never." [R Tr. p. 226, lines 3-12].

Mrs. Sneezer testifed that on the morning when the alleged theft occurred Mrs. Herman left home before Mr. Herman did but before doing so, she wrote down a note to convey to Mr. Herman on instructions from Mrs. Herman [R. Tr. p. 96, line 2, to p. 97, line 5]. The note [Ex. A] was read into the record by Mrs. Sneezer as follows:

> "Mr. Herman, Mrs. Herman told me to tell you she don't like the idea what you said about her—about she don't know what she is doing—what she is doing in the office, and she don't know any—no note you say about her that she don't know anything in the office. She don't know anything what makes her unhappy, really it is time you understood I have been in this business for 18 years. Everyone think I am the greatest. Everyone think I am the greatest, and everyone think I am the greatest in the world but you. If you don't

understood about me, steps—if you don't understand about me, steps will have to be taken because my doctor tells me I am to get—I am not to get nervous any more." [R. Tr. p. 99, lines 11-25].

At trial Mrs. Herman admitted leaving a message with Vicki and stated it was not her custom to do so and that that was the first time she had done so [R. Tr. p. 224, lines 22, 23].

It is not impossible of course that a thief might have picked one ring from a collection of valuable jewels and left the others. The jury as trier of fact, was, however, entitled to entertain certain doubts on the subject.

Polygraph Evidence Was Properly Admitted.

On the record presented, the trial court admitted that the testimony of Kenneth Scarce concerning the polygraph examination conducted by him, and the results thereof. Appellants, in their motion for new trial, relied upon this circumstance. In denying appellants' motion for new trial, the Honorable E. Avery Crary, United States District Judge, prepared a Memorandum Opinion in which the circumstances leading up to the admission of this testimony and the reasons for its admission are thoroughly discussed. A copy of this Memorandum Opinion is appended hereto as "Appendix A". Appellees respectfully request that his Honorable Court consider Judge Crary's Memorandum Opinion as constituting a part of this brief, and the following discussion as being supplementary thereto.

The polygraph examination was taken on April 22, 1965 pursuant to a document signed by plaintiff Lee

Herman and by the attorney representing the appellee insurance companies, which document recites, in part:

> "The Hermans and the Companies do mutually agree that the lie-detector examiner, Mr. Kenneth Scarce, may testify respecting his examination and respecting his opinions based upon said examination in any Court of competent jurisdiction." [Tr. p. 73].

Mr. Arnold Shane, the attorney representing Mr. and Mrs. Herman at the time and place of the taking of the polygraph examination, added the following words to the agreement:

> "Subject to cross-examination by plaintiff." [Tr. p. 73; R. Tr. p. 419, line 20, to p. 420, line 12].

Prior to admitting the polygraph testimony, the trial court permitted testimony regarding the circumstances of the signing of Exhibit C [Tr. p. 73] outside of the presence of the jury. The record will show that only two witnesses testified on this subject, they being Mrs. Herman and Mr. Scarce. Mrs. Herman denied that she signed Exhibit C [Tr. p. 73] on November 11, at the time her polygraph examination was taken [R. Tr. p. 273, line 24, to p. 274, line 6]. Mr. Scarce testified respecting the signing of Exhibit C by Mrs. Herman, that her attorney, whom he believed was a Mr. Shane, said either

> "* * * it is okay for her to sign, it is all right for her to sign or 'I have no objection for her to sign,' I am not sure of the wording * * *" [R. Tr. p. 261, lines 6-12].

Appellants place great reliance in their brief on affidavits concerning this subject. The affiants, how-

ever, were not subject to cross-examination on their subject matter, nor were the affidavits offered or received in evidence. On this subject, the transcript shows as follows:

> "Mr. White: * * * However, I would like to object to the introduction of this affidavit.
>
> The Court: It is not going to be introduced. There has been no offering of the affidavit as far as evidence goes.
>
> Mr. Soll: No." [R. Tr. p. 257, lines 19-25].

The Court, on the evidence presented, was of the opinion that Mrs. Herman did sign the agreement on April 22, 1965 [R. Tr. p. 96, lines 3-5].

On consideration of the appellants' motion for new trial, the court had before it, not only the moving papers, but likewise, points and authorities in opposition and the affidavit of James O. White, attorney for appellees [Tr. pp. 86-88]. It appears clear, from the remarks from Judge Crary in his Memorandum Opinion that he accepted the evidence and the affidavits, indicating that Mrs. Herman did sign the agreement *re* taking polygraph with the concurrence of her attorney, who was then present and raised no objection to the agreement as amended by himself and signed by his client with his acquiescence.

In *Court of Commissioners v. Younger,* 29 Cal. 147, 149, the court states regarding stipulations:

> "While there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the Court *unless the same is signed or assented to by such attorney.*" (Emphasis added).

The same language occurs in *Crescent Canal Co. v. Montgomery,* 124 Cal. 134, 56 Pac. 797, 802, and is likewise quoted in *Boca & L. R. Co. v. Superior Court,* 150 Cal. 153, 88 Pac. 718, 719. The rule is stated in 46 Cal. Jur. 2d page 3, Stipulations, Section 3, as follows:

> "If a party has an attorney of record, a stipulation relating to the conduct or disposal of an action is ineffectual *unless signed or assented to by the attorney.*" (Emphasis added).

Irrespect of whether Mrs. Herman signed the agreement respecting polygraph [Ex. C; Tr. p. 73] on April 22, 1965 or on a prior date, the record is without contradiction that she was represented by counsel at the time of the taking of the polygraph examination, her counsel knew of the circumstances under which it was taken, was familiar with the stipulation and had indeed added an amendment permitting cross-examination of the polygraph examiner, and that the entire proceeding had the approval of appellees' attorney of record.

As stated in *People v. Rogers,* 207 Cal. App. 2d 254, 24 Cal. Rptr. 324, 328:

> "But evidence otherwise incompetent as proof of the existence of a particular fact may be received for that purpose where a defendant stipulates thereto."

In *McBain v. Santa Clara Savings & Loan Association,* 241 Cal. App. 2d 829, 51 Cal. Rptr. 78 (hearing denied), the court considered the effect of a stipulation which was entered into by two of the parties' attorneys, with the attorney for the third party being present but silent regarding the stipulation. The court held that

the stipulation was binding on the silent party, commenting:

> "However, assent to a stipulation need not be made in a formal manner and under the particular circumstances of a case, where a party's counsel remains silent and makes no objection to the stipulation, his passive acquiescence may constitute and assent ot it. (*Palmer v. City of Long Beach, supra;* 46 Cal. Jur. 2d pp. 23-24; *C. Wilson v. Mattei* (1927), 84 Cal. App. 567, 571, 258 P. 453.)" (51 Cal. Rptr. at p. 84).

The court further stated:

> "Under all the circumstances of the case, we are satisfied that the continued silence of Mr. Christy constituted an assent to the stipulation. Indeed, the present objection to the stipulation, seen in the perspective of the proceedings below, appears specious." (51 Cal. Rptr. at p. 85).

It is stated in *Federal Deposit Ins. Corporation v. Siraco,* 174 F. 2d 360, 362-363 (U.S.C.A. 2d):

> "A stipulation may broaden the issues raised by the pleadings or change the rules of evidence as to what may be shown by way of defense under a general denial. (Insurance Co. v. Harris, 97 U.S. 331, 336-337, 24 L.Ed. 959.)"

The only reported California case concerning the use of a polygraph examination after a stipulation, that the same might be used in evidence is *People v. Houser* (1948), 85 Cal. App. 2d 686, 193 P. 2d 937. There, as here, a party who did not like the results of the test appealed after it had been received in evidence, claiming that its admission was improper. The ruling of the

California District Court of Appeal, affirming the conviction in that case, has never been overruled, and appears to constitute the present law of the State of California.

People v. Houser was cited in support of the court's ruling in *People v. Reyes,* 206 Cal. App. 2d 337, 23 Cal. Rptr. 705, 709. In that case the defendants contended that the court erred in submitting the issue of probable cause to the jury. The court, in holding that such was not error under the circumstances, states:

> "However, in the instant case, each of the defendants requested that the issue be tried by the jury and cannot now complain that their request was granted."

Judge Roger Alton Pfaff of the Superior Court of Los Angeles County authored an article which appears in Volume 50 No. 12 (December, 1964) of the American Bar Association Journal. In the article Judge Pfaff discusses the fact that the polygraph has been used in civil cases in Los Angeles County, and cites the decisive role which the polygraph can play in paternity proceedings. Judge Pfaff, in said article, uses the following quote from Arthur and Caputo, Interrogation for Investigators 214 (1959):

> "The results of *properly administered* polygraph examinations are very accurate. The latest estimation, based upon a five-year study of those persons tested by the senior author, accords to his polygraph technique an accuracy of over 96 per cent with a 3 per cent margin of inconclusive (indefinite) determinations and a 1 per cent margin of maximum possible error. The actual

known error during this same period is less than .0005; that is one twentieth 1/20th of one per cent. It is interesting to note that these known errors involved reporting a guilty party to be innocent."

It is stated by Richardson, Modern Scientific Evidence (1961) that such evidence should be admitted with a stipulation. He states:

"The trend is definitely in that direction and possibly a majority of jurisdictions would admit this evidence under stipulation."

In Wigmore on Evidence (3rd Ed. 1940, Supp. 1962):

"Any other result would seem to be inconsistent with the general spirit and practice of our litigation, which judicially leaves to the parties the framing of their pleadings and issues and determines no objection not expressly waived by one of them. Moreover * * * the judicial refusal to recognize it [the stipulation] would often permit unseemly breaches of faith by counsel who have agreed to the admission." (at Sec. 2892).

In an article appearing in 50 A.B.A. Journal 470 (May, 1964) Inbau and Reid note that generally the lie detector technique has at most an approximate 5% error with perhaps another 5% to 10% of tests which are not subject to a conclusion as to the veracity of the person tested. All authorities appear to agree that the competency of the examiner is of great importance in obtaining accurate results.

The *Houser* case, *supra,* was cited by the Arizona court in *State v. Valdez,* 91 Ariz. 274, 371 P. 2d 897 (1962). In that case the defendant was charged with

illegal possession of narcotics. Both he and his attorney signed a stipulation to the effect that polygraph evidence would be permitted. The results of the test were unfavorable to the defendant and defendant's attorney objected to the introduction of the test as evidence. The court held that under the circumstances the test was admissible, and in doing so quoted from *People v. Houser, supra.*

The *Houser* case, *supra,* was also cited in the case of *State v. McNamara,* 252 Iowa 19, 104 N.W. 2d 568 (1960). That case involved a murder trial where the defendant was the only one to sign the stipulation regarding the admissibility of the results of a lie detector test. The court, in holding the results to be admissible states:

> "We hold the lie detector evidence admissible by reason of her [defendant] agreement."

Conclusion.

It was incumbent upon the plaintiff-appellees to sustain the burden of proof that a loss occurred within the terms and conditions of the policies of insurance issued by appellees. There was considerable evidence presented which raised a very serious question as to the *bona fides* of the claim. It was established that had there been a judgment in favor of plaintiffs, a considerable profit would have resulted by reason of the policies having been issued on a "valued" basis, based upon the questionable appraisal of jeweler Braun. The circumstances of the claimed loss, where the thief, if there was one, picked out one gem amongst a collection purportedly worth about $100,000.00, and left the remainder; where there was no evidence of forced entry

in a home which purportedly was extremely security-conscious; and where the jury had a right to, and undoubtedly did, conclude that there was serious impeachment of the witnesses called on behalf of plaintiff, the polygraph evidence was but another and additional part of the impeaching evidence admitted at trial.

Appellants' attorney not only agreed to the polygraph examination, but suggested that it be taken. The stipulation regarding the admissibility of the testimony of the polygraph examiner was amended by appellants' attorney who was present at the time of the examination which did not proceed until the amendment had been added. The polygraph examination was taken as a direct result of the stipulation. The present position of appellants, who undoubtedly would have been pleased to have the testimony had it been favorable to their position, would appear to be the type of situation remarked upon by Wigmore (*supra*) where he mentions "unseemly breaches of faith by counsel who have agreed to the admission".

Appellees respectfully urge that the Court properly admitted the results of the polygraph examination, that the case was fairly tried, and that the judgment based upon the verdict is a proper judgment under the facts and under the law.

Respectfully submitted,

CUMMINS, WHITE & BREIDENBACH,
By JAMES O. WHITE,
Attorneys for Appellees.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

James O. White

APPENDIX A.

Memorandum Opinion and Order Denying Motion for New Trial.

United States District Court, Central District of California.

Lee Herman and Victor Herman, Plaintiffs, vs. Eagle Star Insurance Company, Ltd., a corporation; Centennial Insurance Company, a corporation; Niagara Fire Insurance Company, a corporation, Defendants. No. 65-191-EC.

Filed Sep. 28, 1966.

Plaintiffs move for a new trial for the several reasons noted in their motion but rely in chief on the grounds that the court erred "* * * in admitting the testimony of Kenneth Scarce concerning the administering by him and the taking by the plaintiff, Lee Herman, of a polygraph examination concerning the circumstances surrounding the mysterious disappearance of the diamond ring in question, together with the admitting into evidence of the chart of the polygraph examination, and admitting into evidence the interpretation by the witness, Kenneth Scarce, of the polygraph examination, and admitting into evidence the opinion of Kenneth Scarce concerning the results of the polygraph examination" (Page 1, line 28, to line 5, page 2, Motion for New Trial). Plaintiffs' points and authorities filed in support of their motion for new trial are devoted entirely to the matter of the polygraph evidence relating to plaintiff, Lee Herman, and plaintiffs urge that the polygraph and the testimony of Mr. Scarce were erroneously admitted, in that the stipulation therefor was not signed by plaintiffs' counsel and the right

to object to the evidence was reserved in the Pre-Trial Order.

The question of the admissibility of evidence in trials in the Federal court is governed by Rule 43, Federal Rules of Civil Procedure. Applying that rule to the instant case, all evidence should be admitted if admissible under a Federal statute or rules applied by courts of the United States in suits in equity or under the rules of evidence applied in the courts of general jurisdiction of the State in which the United States Court is held.

The case of *People v. Houser* (Cal. 1948), 193 Pac. 2d 937, discussed hereinafter, concerns the question here involved, although some will argue that it is not clearly in point and for that reason cases in other jurisdictions are considered and discussed in this Memorandum Opinion with the purpose of determining what the rule in California would be in the factual situation found herein.

The general rule is well established in California and elsewhere that polygraph tests or testimony with respect thereto are not admissible in evidence. The New Jersey appellate court in *State vs. Arnwine* (1961), 67 New Jersey Super. 483, 495, said "* * * that there is not a single reported decision where an appellate court has permitted the introduction of the results of a polygraph or lie detector test as evidence in the absence of a sanctioning agreement or stipulation between the parties."

In the case at bar, Mrs. Herman (Lee Herman) signed an "Agreement re Polygraph Examination" (Defts.' Ex. C) which provided, in part, that the polygraph test be taken and that the "lie detector" ex-

aminer, Mr. Kenneth Scarce, might give all information re said test to the companies, and it was mutually agreed that Scarce "* * * testify respecting his examination and respecting his opinion based upon said examination in any court of competent jurisdiction subject to cross-examination by plaintiffs." It was further agreed that a transcript of the polygraph examination should constitute "* * * examinations under oath which are provided for in the policies of insurance issued by the companies * * *."

There is a controversy as to whether the agreement was signed by Lee Herman on November 11, 1964, when the polygraph test was given to Mr. Herman, her husband, at their home in Beverly Hills, or on April 22, 1965, when Mrs. Herman's test was made at their home. The original agreement, signed by Mr. Herman on November 11, 1964 (Defts.' Ex. D), contained the notation in the handwriting of Mrs. Henman, "Due to illness Mrs. Herman is not taking the polygraph examination. (Signed) Lee Herman."

Mr. Herman's test was made before the plaintiffs had employed counsel to file the instant action. Charles J. Katz, Esq., was employed for that purpose some time after November 11, 1964. The case was filed in the State court on January 25, 1965, and removed to this court on or about February 5, 1965.

At the time Mrs. Herman underwent the polygraph test on April 22, 1965, she was represented at the examination by Attorney Arnold Shane, an associate of Mr. Katz. Mrs. Herman was tested by Mr. Scarce in the presence of Mr. Shane and Mr. White, counsel for the defendant companies.

The evidence is in conflict as to when Mrs. Herman signed the agreement dated April 22, 1965. That agreement was a carbon copy of the November 11, 1964, agreement and was amended by Mr. Shane, or on his suggestion, by omissions and interlineations (See Ex. C). It is noted that all handwriting and the signature of Mr. Herman on the agreement dated November 11, 1964 (Ex. D), as well as Mrs. Herman's signature following the notation as to why she was not taking the test at that time, were written with a pen containing purplish ink wheras the changes in the agreement dated April 22, 1965, (Ex. C) and Mrs. Herman's signature thereon are in blue ink. Mr. Shane, by his supporting affidavit, states he inserted the amendment to paragraph 4 of the stipulation of April 22, 1965 (Ex. C). It appears on close examination of the ink used in the changes that it is the same as that in the signature "Lee Herman". The pen used by Mr. Herman in signing the agreement (Ex. D) on November 11th is obviously the same as used by Mrs. Herman in the writing and signing of the note re her illness on the November 11th agreement. If she had signed the April 22nd agreement on the previous November 11th date, it is reasonable to conclude she would have used the same pen to sign the copy which was used on April 22nd as used in her note and signature thereto made on November 11th. Likewise it is logical to conclude that the amendments and Mrs. Herman's signature on the agreement dated April 22, 1965, were written with the same pen and therefore at the same time. It is obvious that the ink used on the November 11th and April 22nd agreements is not the same.

Mrs. Herman testified that she signed the stipulation dated April 22, 1965, on November 11, 1964. Lapse of

time often dulls memory and it is true that Mrs. Herman did sign the note on the November 11th agreement. It might be easy to confuse the date of her signing the agreement dated April 22, 1965, in the circumstances.

It appears reasonable to conclude from a consideration of all the evidence that the agreement dated April 22, 1965, was signed by Mrs. Herman on that date. Her counsel, Mr. Shane, at that time, did not sign the agreement and stated in a supporting affidavit that he was asked by Attorney White to sign the stipulation but he declined. Mr. White stated in open court and confirmed by affidavit dated September 6, 1966, that Mr. Shane refused to sign the stipulation for the reason he was new in the case but that he would and did permit Mrs. Herman to sign and that she did so sign the stipulation on April 22, 1965.

The question to be determined is whether in the circumstances the polygraph test and the testimony of the examiner re same were properly admitted.

All but one of the many cases examined by the court which concern the use of polygraph tests as evidence were criminal cases.

Referring first to California authorities, the only case wherein a polygraph and testimony of the examiner were held to have been admitted properly is People vs. Houser, 85 Cal. App. 2d 686, 193 Pac. 2d 937, 940 and 942. That case involved prosecution of the defendant for lewd and lascivious conduct. One of the grounds urged on appeal was error in the admission of the results of a polygraph test. A *written stipulation* had been signed by the prosecutor, the defendant and his counsel, authorizing receipt of the results of the

test in evidence and stating that the operator was an expert in interpreting the results of the test. After reciting the stipulation the appellate court observed:

> "It would be difficult to hold that defendant should now be permitted on this appeal to take advantage of any claim that such operator was not an expert and that as to the results of the test such evidence was inadmissible, merely because it happened to indicate that he was not telling the truth * * *." (Page 492)

Counsel for plaintiffs urge that this language suggests that the defendant first raised the objection on appeal. It is true the opinion is not clear in this regard but if the point was being first raised on appeal it appears more likely that the appellate court would have summarily disposed of the point on that ground rather than discussing the testimony re the polygraph and the terms and effect of the stipulation.

Stone vs. Earp (Mich. 1951), 50 No. West. 2d 172, 174, is the only *civil case,* which has been cited or research discloses, wherein the question here involved is discussed. During the course, of the trial in that suit the judge stated he was not going to decide the case until both parties took a lie detector test. The parties thereupon agreed that each should take the test and the examiner be allowed to testify as to the results. The Supreme Court of Michigan held it was error to admit in evidence the results of the tests, which were favorable to the defendant and unfavorable to the plaintiff, but that such evidence was not prejudicial in the

circumstances. At page 174 of its opinion the court says:

> "We are not unmindful of the fact that at the direction of the trial court, the parties agreed to submit to the tests, but whether by voluntary agreement, court direction, or coercion, the results of such tests do not attain the statute of competent evidence."

It appears to this court that the Stone case is to be distinguished from the case at bar by reason of the fact the tests in the Stone case were at the direction of the trial court and not pursuant to an agreement of the nature involved in the case at bar. At best, the comment of the court re a voluntary agreement not making the results of such tests competent evidence is dictum and no authorities are cited in support thereof. In *Colbert vs. Commonweath* (Ky. 1957), 306 So. West. 2d 825, the defendant appealed from a judgment of conviction of armed robbery. The court held that it was error to admit a lie detector test of the defendant. The defendant in the trial court requested permission to take the test and "agreed to be bound by the results." In holding the test inadmissible, the appellate court stated at page 827 of its opinion:

> "Only one recorded case has come to our attention in which results of a lie detector test were held admissible on the basis of a stipulation. In that case, People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937, the defendant not only stipulated in writing that the results of the test could be admitted in evidence, but also that the operator of the lie detector was a qualified expert. We do not consider the instant case to fall in that category.

> Here there was no written stipulation, but only an oral agreement to take the test and be bound by the results, which agreement was not entered of record at the time it was made. We think more formality should be required to give effect to an agreement of such importance. Furthermore, there is no contention that the agreement stipulated the qualifications of the person who gave the test. Accordingly, we do not approach the case as one involving a stipulation of full admissibility."

It is reasonable to conclude that the Kentucky court would have held a polygraph test taken pursuant to the agreement in the Houser case to be admissible.

The Supreme Court of Iowa, in *State vs. McNamara* (Iowa, 1960), 104 No. West. 2d 568, held that a lie detector test was admissible in evidence by reason of the agreement between the parties. The stipulation had been signed by the defendant and witnessed by her attorney and a deputy sheriff. Defendant's counsel, at the trial, objected to any evidence regarding the tests on the grounds they were unreliable and prejudicial. In affirming the conviction for second degree murder, the court observed, at page 574 of its opinion:

> "In the case at bar the defendant expressly agreed and stipulated that the evidence of Professor Holcomb as to the polygraph tests might be received. Exhibit 39 was denominated a 'Release' but it was more than that. She agreed and stipulated that 'said examiner may testify in a Court of Law as to his opinion as to the results of said examination.' The release was signed only after negotiations between defendant's counsel and the county attorney, and after the above quoted

portion thereof was typed as an addition to the printed form. In view of her agreement made with the approval of her able attorney she should not now be permitted to retract her agreement because the test proved unfavorable to her."

The McNamara case is re-affirmed by the Iowa court in *State vs. Freeland* (Iowa 1964) 125 No. West. 2d 829. In the case at bar counsel for Mrs. Herman was fully aware, at least by April 22, 1965, of the terms of the agreement re the polygraph examination. Mr. Shane read the agreement on April 22, 1965, and Mr. Katz states in his affidavit in support of the motion for new trial that Mr. Shane advised him of the terms of the agreement when he (Shane) returned to the office on April 22nd.

Plaintiffs, nor their counsel, at any time prior to trial took the position that the stipulation was not valid because it was not signed by plaintiffs' attorney. On April 23, 1965, plaintiffs' counsel filed their contentions of fact and law and on May 20, 1965, a comprehensive memorandum of law. In neither of these documents was any mention made of the claimed illegality of the stipulation for the taking or use in evidence of the polygraph and the testimony of the examiner or that Mrs. Herman was not bound by the agreement or any part thereof. No contention was made that the agreement was entered into by mistake or because of misrepresentation or that plaintiff should be relieved from same.

Present counsel came into the case on April 1, 1966. They now urge that by the terms of the Pre-Trial Order (page 7, lines 5 to 8, and lines 13 and 14), pre-

pared by Mr. Katz, plaintiffs reserved the right to object to the polygraphs and transcriptions of recordings resulting from the examination, and so forth, of both plaintiffs. Plaintiffs were allowed to object to the offer of said evidence but the objection was overruled on the basis of the authorities referred to herein.

Mr. Shane filed an affidavit re the signing of the stipulation by Mrs. Herman but did not testify in that regard. Mr. Katz was not called as a witness and it appears from his affidavit in support of the motion for a new trial that all he knew about the signing of the stipulation by Mrs. Herman was what his clients had told him.

Although there has been much discussion as to the date Mrs. Herman signed the stipulation, the court concludes that the answer to the question involved is not determined solely by whether Mrs. Herman signed the stipulation on November 11th or April 22nd.

The Supreme Court of New Mexico in *State vs. Tremble* (1961), 362 P.2d 788, 789, cited by plaintiffs, held that the trial court had erred in admitting in evidence the results of a lie detector test although the admission was by reason of a waiver signed by the defendant agreeing to be bound by the results of the test. At page 789, the appellate court observed:

> "We think the court was led into error. The signing of a waiver did not alter the rule with regard to Hathaway's evidence." Citing Colbert vs. Commonwealth, supra, and LeFevre vs. State (Wisc. 1943), 8 No. West. 2d 288.

In *LaFevre vs. State,* the defendant, in a murder case, submitted to a series of lie detector tests under a

stipulation with the District Attorney which provided that the results might be admitted in evidence. The results of the tests were favorable to the defendant but excluded by the court on objection of the State. The Supreme Court of Wisconsin held the exclusion proper in the circumstances, but the court gave no reason or authority for so holding other than *State vs. Bohner* (Wisc.), 246 No. West. 314, a case in which no stipulation was involved. It is also to be noted in the LeFevre case that the *District Attorney had testified that the tests were favorable to the defendant.* At page 293, the court said:

> "We have the word of the district attorney that those tests were favorable to the defendant. While the findings of these experts were properly excluded from the jury, the district attorney's testimony came in without objection and we regard it as very significant."

The results of the tests were, therefore before the court, and the court, on appeal, held that the defendant's conviction was not supported by the evidence and the defendant was forthwith released from custody.

Counsel for plaintiffs also relies on *State vs. Lowry* (Kan. 1947) 185 P. 2d 147. In that case the agreement was only to the taking of the test, not that the results could be used in evidence. The court observed, at page 151 of its opinion:

> "* * * it must be remembered that we are not here considering a case where there was a prior agreement that the results of the test might be admitted in evidence * * *."

The court. in the Lowry case, also discusses and quotes at length from law review articles in the Wisconsin

Law Review and others, all of which distinguish cases wherein a stipulation for use of the test is involved from those where no such an agreement was entered into.

The Lowry case, supra, and others referred to herein, was cited in *People vs. Wochnick* (1950) 98 Cal. App. 2d 124, 219 P. 2d 70, relied on by plaintiffs, but no stipulation for the use of the test was there involved and the general rule was applied which is based on the proposition that the lie detector has not "* * * attained such scientific and psychological accuracy, nor its operators such sureness of the interpretation of figures on a dial that the testimony here in question was competent, over objection, for submission to a jury holding the fate of the defendant in its hands * * *." This quotation from the Lowry case appears at pages 127 and 128 of the opinion in Wochnick, supra.

Plaintiffs also rely on *People vs. Zazzetta* (Ill. 1963), 189 No. East. 2d, 260, wherein the Illinois court ruled that the polygraph test and results were not admissible because (a) the stipulation was "oral", (b) the defendant was a man with an eighth grade education who appeared without counsel at all times prior to trial, including the time the oral stipulation was made, (c) no evidence was introduced regarding the method of testing or the qualifications of the operator, and (d) the examiner was not available for cross-examination.

In the recent case of *State vs. Valdez* (Ariz. 1962), 371 P. 2d 894, the Supreme Court of Arizona treated at length the question of the admissibility in evidence of a polygraph test and the expert testimony relating thereto in the circumstances there involved. The test

had been made pursuant to a stipulation, between the County Attorney, the defendant and his counsel, which provided that the results of the test were admissible in evidence at the trial. The polygraph operator was permitted to testify to the results of the examination over the objection of defendant's counsel. The jury returned a verdict of guilty and the question of the proprietary of the admission of the results of the test in the circumstances was certified to the Supreme court of Arizona.

This being a matter of first impression in Arizona, the court reviewed many opinions of text writers, law review articles and authorities on the subject, including all of the cases cited and discussed herein except the Zazzetta case, decided after Valdez.

In commenting on the LeFevre case, supra, the Court pointed out that the District Attorney objected to the "reports by themselves" of the polygraph examination and "only on the ground" that the examiners were not present and should have been called to testify as to the results (page 898, 899). At page 899 the court comments on the holdings in several of the cases cited herein as follows:

> "In addition to the express holdings in Houser and McNamara admissibility of lie-detector evidence upon stipulation has been indicated by implication in the following cases: State v. Arnwine, 67 N.J. Super. 483, 498, 171 A.2d 124, 132 (1961); Colbert v. Commonwealth, 306 S.W. 2d 825, 71 A.L.R. 2d 442 (Ky. 1957); Commonwealth v. McKinley, 181 Pa. Super, 610, 123 A.2d 735 (1956); State v. Lowry, 163 Kan. 622, 185 P. 2d 147 (1947). For a discussion of unreported

trial cases in which lie-detector results were admitted per stipulation see 1943 Wis. L. Rev. at 435; 26 J. Crim. L. & C. 262 (1935-36)."

The Arizona court, after discussing the cases pro and con re the admissibility of the results of polygraph tests, concludes that where the parties have stipulated to the admissibility of the evidence in Arizona criminal cases the evidence is admissible (subject to certain qualifications stated) to corroborate other evidence of a defendant's participation in the crime charged and if he takes the stand such evidence is admissible to corroborate or impeach his own testimony.

At page 900 of the opinion, the court commented on the perfection of the lie detector test and the probative value thereof as follows:

> "With improvement in and standardization of instrumentation, technique and examiner qualifications the margin of proven error is certain to shrink. 'Modern court procedure must embrace recognized modern conditions of mechanics, psychology, sociology, medicine, or other sciences, philosophy, and history. The failure to do so will only serve to question the ability of courts to efficiently administer justice.' Chappell, J., concurring in Boeche v. State, 151 Neb. 368, 383, 37 N.W. 2d 593, 596, 600 (1949). Although much remains to be done to perfect the lie-detector as a means of determining credibility we think it has been developed to a state in which its results are probative enough to warrant admissibility upon stipulation. Cf., People v. Zavaleta, 183 Cal. App. 2d 422, 6 Cal. Rptr. 166, 171 (1960)."

The *Zavaleta* case, 6 Cal. Rptr. 166, cited above, holds, in pertinent part:

> "It has long been established that counsel may stipulate to evidence which may be received (People v. Mathews, 163 Cal. App. 2d 795, 329 P. 2d 983) even though it might be inadmissible (People v. Ah Ton, 53 Cal. 741), * * * In the absence of any claim that the stipulation was entered into by mistake, inadvertence, fraud or misrepresentation and that defendant should be relieved of the same, we find no merit to objection raised at this time." (Page 171).

In the case at bar neither Mrs. Herman nor her counsel were uninformed as to the nature of polygraph tests, as Mrs. Herman had undergone such a test administered by her own polygraph expert, Mr. Russell James, in March, 1965, more than one month prior to her examination on April 22nd. Whether the stipulation was signed by Mrs. Herman on April 22, 1965, or November 11, 1964, does not appear to the court to be determinative of the matter. Her counsel was present before and during the examination, made changes in the stipulation and made no objection to Mrs. Herman taking the test. He knew the terms under which the test was being given and no objection was made as to the provision in the stipulation for use of the test in evidence or the manner in which it was taken. Although plaintiffs reserved the right to object to the polygraph test and transcriptions of the recordings in the Pre-Trial Order filed May 10, 1965, no mention was made of any contention of law in plaintiffs' memorandum of law filed May 20, 1965, that the tests, or either of them, would not be admissible in evidence although the provi-

sions of the stipulation re admissibility into evidence of the tests were known to plaintiffs and their counsel at least since April 22, 1965, and this is true though a copy of the stipulation signed by Mrs. Herman was not sent to plaintiffs' counsel by Mr. White until December, 1965. It is also to be noted that no relief was sought from the stipulation at any time before trial.

There is little doubt but that plaintiffs would have relied on the stipulation if the polygraph tests had resulted favorable to plaintiffs' position. Having in mind all of the facts and circumstances in the case and the pertinent authorities, the court concludes that, by reason of the stipulation, Exhibit C, the testimony of Mr. Kenneth Scarce re his examination and his opinion based upon said examination together with the polygraph, plaintiffs' Exhibit 7, and the transcript of the examination, defendants' Exhibit F, were properly admitted into evidence.

For the reasons stated above, the plaintiffs' motion for new trial is denied.

Dated: September 28, 1966.

E. Avery Crary
United States District Judge

No. 21556

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE HERMAN and VICTOR HERMAN,

Appellants,

vs.

EAGLE STAR INSURANCE COMPANY, LTD., *et al.*,

Appellees.

APPELLANTS' CLOSING BRIEF.

JAFFE, OSTERMAN & SOLL,
6380 Wilshire Boulevard,
Suite 900,
Los Angeles, Calif. 90048,
Attorneys for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

No. 21556

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE HERMAN and VICTOR HERMAN,

Appellants,

vs.

EAGLE STAR INSURANCE COMPANY, LTD., *et al.*,

Appellees.

APPELLANTS' CLOSING BRIEF.

Prefatory Statement.

In their brief, the Appellee insurance companies have asserted two major premises: 1. That there was evidence justifying the verdict, even if the polygraph evidence were to have been excluded; and, 2. That the polygraph evidence was properly admitted pursuant to stipulation.

Apparently, Appellees do not contest the California law which has been remarkedly critical of polygraph evidence and which has steadfastly restricted its admissibility because of the basic unreliability of the alleged "science". Nor do Appellees question the Appellants' statement of California Law relating to stipulations and the requirement that they be signed or assented to by the *attorney of record* of the party to be bound by the stipulation. Appellees ignore the point raised by Appellant that where a party is represented by an attorney of record, the party cannot enter into a stipulation affecting the conduct of the action.

The Admission of the Polygraph Evidence Was, in Itself, Prejudicial and Reversible Error.

Appellees have attempted to cite other evidence in the record that they feel would justify the verdict. However, if the admission of the polygraph evidence was in error, which Appellants insist it was, then it was error of such magnitude as necessarily to have prejudiced and influenced the jury to the detriment of the Appellants. The insurance companies' polygraph examiner testified that the plaintiff, in his opinion, had lied concerning the disappearance of the diamond ring. Such evidence could not possibly have been more damning to the plaintiffs' cause. This, notwithstanding the fact that the polygraph examiner admitted that "the polygraph results are no more accurate than the examiner." [Rep. Tr. p. 388, lines 5-6.] It is just such a statement that justifies the Appellants' position that they were maneuvered by the insurance companies into a trap whereby they agreed to be bound by the results of the insurance companies' test conducted and interpreted by the insurance companies' man.

No Attorney of Record Ever Signed or Assented to the Alleged Stipulation (Exhibit "C").

Contrary to assertions by Appellees in their brief, the attorney of record for the Appellants never signed nor assented to Exhibit "C" (the so-called stipulation). The evidence is uncontradicted that at the time of the polygraph examination of plaintiff, Lee Herman, on April 22, 1965, the attorney of record for Appellants was Charles J. Katz. He was the only attorney of record and was a sole practitioner according to the records in this case. He was not in attendance at the time of the polygraph examination but instead another attorney,

Arnold Shane, was in attendance. As appears from the affidavit of Arnold Shane [Clk. Tr. pp. 58-60], Mr. Shane was associated with the offices of Mr. Katz but that Charles J. Katz was the attorney of record.

It is also to be noted that the polygraph examination was an extra-judicial proceeding and was not a part of the lawsuit. Therefore, Mr. Shane's appearance at that proceeding could not be deemed to be an appearance for and on behalf of Mr. Katz in connection with any regular court proceedings in this action. The plaintiffs had never substituted Mr. Shane for Mr. Katz nor had they agreed to an association of counsel. The only attorney of record for the plaintiffs was Charles J. Katz and he was the only man authorized to sign or assent to a stipulation affecting the conduct of the action.

Appellees assert on Page 11 of their brief that the *evidence* presented to the trial court established that plaintiff, Lee Herman, signed the polygraph agreement on April 22, 1965, when her attorney was present. It is submitted that the only evidence offered by the parties on the question of the date of signing Exhibit "C" consisted of the sworn testimony of plaintiff, Lee Herman, the sworn testimony of defendants' witness, Kenneth W. Scarce (the polygraph examiner), and the sworn affidavit of Arnold Shane. There was no other *evidence* which the trial court considered when determining the validity of Exhibit "C" as a stipulation and the admissibility of the evidence in question, namely, the polygraph examination. The sworn testimony of plaintiff, Lee Herman, and the sworn affidavit of Arnold Shane was that the so-called stipulation [Ex. "C"] was signed prior to April 22, 1965 and prior to the time that plaintiffs were repre-

sented by counsel. The sworn testimony of Mr. Scarce was that he did not know when plaintiff Lee Herman signed Exhibit "C". [Rep. Tr. p. 268, lines 17-23.] On the state of the record of sworn testimony before the trial court, both by oral testimony and affidavit, there was no evidence in the record that would permit a finding by the trial court that the polygraph agreement [Ex. "C"] was signed by Mrs. Herman on April 22, 1965. The only evidence that was in the record indicated that it was signed by her on November 11, 1964 at a time when she was not represented by counsel.

It is uncontradicted that no attorney for Appellants ever signed the alleged stipulation. [Ex. "C".] Appellees' suggestion at page 17 of their brief that Appellants' attorney agreed to the polygraph examination and suggested that it be taken and that Appellants' attorney was present at the time of the examination is unsupported by any evidence in the record. It is directly contrary to the record which disclosed Charles J. Katz as the only attorney of record for plaintiffs at the time in question and that he was not present. The contrary assertions by Appellees represent wishful thinking based on the self-serving hearsay declarations of their counsel at the time of trial and statements of counsel are not evidence.

Conclusion.

It is submitted that the trial court was in error in finding that there was a stipulation for the admission of polygraph evidence. This error permitted the introduction of evidence which was highly inflammatory and prejudicial to the plaintiffs and prevented plaintiffs from having a fair trial. Since the trial of the

instant case, plaintiffs have filed an action against defendants in the Superior Court of the State of California for the County of Los Angeles, case number 921431, in which plaintiffs have asked for a rescission and cancellation of the so-called polygraph agreements on the grounds of fraud, duress, undue influence, misrepresentation and mistake. This proceeding to rescind and cancel the polygraph agreements would have been taken by Appellants before the trial of this action except that Appellants believed that the polygraph agreements were not binding and the right to object to the polygraph evidence was expressly reserved in the Pre-trial Order. [Clk. Tr. p. 41, lines 4-14.] Appellants have withheld serving the Appellee insurance companies in connection with said action, pending the outcome of this appeal.

It is respectfully urged that this court reverse the judgment below and remand this cause for a new trial. This will permit plaintiffs to have the new trial conducted on a basis that does not deprive them of their rights to a fair trial and plaintiffs will be permitted to pursue their remedies for the rescission of the polygraph agreements so that the polygraph evidence will not be an issue at the re-trial of this cause.

Respectfully submitted,

JAFFE, OSTERMAN & SOLL,
By ARTHUR SOLL,
Attorneys for Appellants.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ARTHUR SOLL

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

WILLIAM EDWARD [illegible], Appellant, v. UNITED STATES OF AMERICA, Respondent.	No. [illegible] (C)

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

APPELLANT'S OPENING BRIEF

[illegible]
ATTORNEY FOR APPELLANT
[illegible]
[illegible], CALIF. [illegible]
TELEP. [illegible] AREA CODE [illegible]

INDEX

TABLE OF AUTHORITIES

TABLE OF DECISIONS

TABLE OF AUTHORITIES (Cont'd) PAGE

LEGISLATIVE DOCUMENTS:

INDEX

TABLE OF AUTHORITIES

Table of Contents

TABLE OF AUTHORITIES (Cont'd) PAGE

LEGISLATIVE DOCUMENTS:

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

WILLIAM EDWARD ROSE, Appellant, v. UNITED STATES OF AMERICA Respondent,	No. 36910-SD (C)

Appeal From the United States District Court
For the Southern District of California
Southern Division

APPELLANT'S OPENING BRIEF

I.

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court for the Southern District of California, Southern Division, adjudging appellant guilty of one count of a one-count indictment charging a violation of Title 18, United States Code, Section 1407, to-wit: Failure of a narcotic user to register. References to the Reporter's Transcript will hereinafter be designated R.T., references to the Clerk's Transcript will hereinafter be designated C.T., and reference to the Amended Clerk's Transcript will hereinafter be designated as-A.C.T.

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

WILLIAM EDWARD YORK, Appellant,	No. 24712-CD (c)
v.	
UNITED STATES OF AMERICA Respondent,	

Appeal from the United States District Court
for the Southern District of California
Southern Division

APPELLANT'S OPENING BRIEF

I.

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court for the Southern District of California, Southern Division, adjudging appellant guilty of one count of a two-count indictment charging a violation of Title 18, United States Code, section 1427, to-wit: Failure of a narcotic user to register. References to the Reporter's Transcript will hereinafter be designated R.T., references to the Clerk's Transcript will hereinafter be designated C.T., and references to the sealed Clerk's Transcript will hereinafter be designated ss-C.T.

Appellant was convicted following a waiver of jury trial and stipulation as to the facts, of the single count indictment(R.T., p. 6). On September 8, 1966, judgment was entered (C.T., p. 16). A timely notice of appeal was filed four days later, on September 12, 1966 (C.T., p. 17).

The District Court had jurisdiction pursuant to the provisions of Title 18, U.S.C., Section 3231. This court has jurisdiction to entertain the instant appeal from a judgment under Title 28, U.S.C., Sections 1291 and 1294, and Rules 37 and 39 of the Federal Rules of Criminal Procedure (Title 18, U.S.C.).

II.

STATEMENT OF THE CASE

An indictment was returned against appellant by the Grand Jury for the United States District Court, Southern District of California, Southern Division, which indictment was filed on July 6, 1966 (C.T., p. 3). The indictment was in one count and charged in essence that on or about May 29, 1966, appellant, being a citizen of the United States who was then "addicted to and a user of" narcotic drugs, returned to and entered the United States at the Port of San Diego (San Ysidro), San Diego County, without registering with a Customs official, and without surrendering the certificate required by law in violation of Title 18, U.S.C., Section 1407.

Appellant was thereafter arraigned and subsequently

Appellant was convicted following a waiver of jury trial and stipulation as to the facts, of the single count indictment(C.T., p. 5). On September 6, 1956, judgment was entered (C.T., p. 14). A timely notice of appeal was filed four days later, on September 12, 1956 (C.T., p. 17).

The District Court had jurisdiction pursuant to the provisions of Title 18, U.S.C., Section 3231. This court has jurisdiction to entertain the instant appeal from a judgment under Title 28, U.S.C., Sections 1291 and 1294, and Rules 37 and 39 of the Federal Rules of Criminal Procedure (Title 18, U.S.C.).

II.

STATEMENT OF THE CASE

An indictment was returned against appellant by the Grand Jury for the United States District Court, Southern District of California, Southern Division, which indictment was filed on July 6, 1956 (C.T., p. 1). The indictment was in one count and charged in essence that on or about May 29, 1956, appellant, being a citizen of the United States, was then "addicted to and a user of" narcotic drugs, returned to and entered the United States at the Port of San Diego (San Ysidro), San Diego County, without registering with a Customs official, and without surrendering the certificate required by law in violation of Title 18, U.S.C., Section 1407.

Appellant was thereafter arraigned and subsequently

filed a Motion to Dismiss the Indictment and a Motion to Strike portions of the indictment (C.T., p.4, 5), said Motions being predicated on the ground that the indictment charged an offense which violates the Constitution of the United States in that said indictment and the statute it was predicated upon contravened the Due Process provision of the Fifth Amendment to the Constitution; the prohibition against self-incrimination contained in the Fifth Amendment to the Constitution; and the Eighth Amendment prohibition against cruel and unusual punishment. Said motion also requested the court to strike from the indictment that portion which alleged that at the time of the commission of the offense, defendant was "a user of" narcotic drugs, on the ground that this phrase is vague and ambiguous and violative of the Due Process provision of the Fifth Amendment to the Constitution. A hearing was had on said motion, at the conclusion of which hearing the said motion was denied and the plea of not guilty was entered on behalf of appellant (A.C.T. p.2).

On August 16, 1966, jury trial was waived and the case was tried on stipulated facts (R.T., p.5, 6; C.T., p.14, 15), counsel for appellant moved for a dismissal of the indictment and striking a portion of the indictment which was denied, and the verdict was returned against the appellant (R.T., p.6).

On September 8, 1966, the appellant was adjudged

filed a motion to dismiss the indictment and a motion to strike portions of the indictment (C.T., p.4, 5), said motions being predicated on the ground that the indictment charged an offense which violates the Constitution of the United States in that said indictment and the statute it was predicated upon contravened the Due Process provision of the Fifth Amendment to the Constitution; the prohibition against self-incrimination contained in the Fifth Amendment to the Constitution; and the Eighth Amendment prohibition against cruel and unusual punishment. Said motions also requested the court to strike from the indictment that portion which alleged that at the time of the commission of the offense, defendant was "a user of" narcotic drugs, on the ground that this phrase is vague and ambiguous and violative of the Due Process provision of the Fifth Amendment to the Constitution. A hearing was had on said motion, at the conclusion of which hearing the said motion was denied and the plea of not guilty was entered on behalf of appellant (A.C.T. p.1).

On August 15, 1966, jury trial was waived and the case was tried on stipulated facts (R.T., p.2, 3; C.T., p.14, 15), counsel for appellant moved for a dismissal of the indictment and striking a portion of the indictment which was denied, and the verdict was returned against the appellant (R.T., p.4).

On September 2, 1966, the appellant was adjudged

to be a young adult offender pursuant to the provisions of Section 5010 (a) of Title 18, U.S.C., and placed on probation (C.T., p.16).

III.

SPECIFICATION OF ERRORS

1. The District Court erred in failing to strike from the indictment the portion thereof alleging that defendant-appellant was a "user" of narcotics.

2. The District Court erred in failing to dismiss the indictment.

3. The statute under which defendant-appellant was indicted, tried and sentenced, to-wit: Title 18, U.S.C., Section 1407, is unconstitutional in whole or in part when applied to appellant.

IV

STATEMENT OF FACTS

An indictment was filed on July 6, 1966, in the United States District Court, Southern District of California, Southern Division, charging appellant of being a citizen of the United States who was, on May 29, 1966, "addicted to and a user of narcotic drugs", and who, upon re-entering the United States at the Port of San Diego, (San Ysidro), County of San Diego, failed to register with a Customs official, and also failed to surrender the certificate required by law in violation of Title 18, U.S.C., Section 1407 (C.T., p.3).

to be a young adult offender pursuant to the provisions of Section 5010 (a) of Title 18, U.S.C., and placed on probation (C.T., p.18).

III.

INDICTMENT OF CHARGES

The district court erred in failing to strike from the indictment the portion thereof alleging that defendant-appellant was a "user" of narcotics.

1. The district court erred in failing to dismiss the indictment.

2. The statute under which defendant-appellant was indicted, tried and sentenced, 26-USC Title 18, U.S.C., Section 1407, is unconstitutional in whole or in part when applied to appellant.

IV

STATEMENT OF FACTS

An indictment was filed on July 6, 1966, in the United States District Court, Northern District of California, Southern Division, charging appellant of being a citizen of the United States who was, on May 26, 1966, "addicted to and a user of narcotic drugs", and who, upon re-entering the United States at the Port of San Ysidro, (San Ysidro), County of San Diego, failed to register with a Customs official, and also failed to surrender the narcotic drugs regulated by law in violation of Title 18, U.S.C., Section 1407 (C.T., p.2).

Appellant was thereafter arraigned and subsequently filed a Motion to Dismiss Indictment and Motion to Strike portions of the indictment (C.T., p.4, 5), which motions were predicated on the ground that the phrase "and a user" was indefinite, and ambiguous, and that the indictment and the statute upon which it was founded was violative of the privilege against self-incrimination, of the Fifth Amendment to the Constitution, and the prohibition against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution (C.T., p.4, 5). A hearing was had on said motions and following oral argument the motions were dismissed (A.C.T., p.2).

On August 16, 1966, jury trial was waived and the case was heard on stipulated facts and decided on the same day (R.T., p.4-6). The stipulated facts (C.T., p.14, 15) show that if HERBERT W. REAY, JR., was called as a witness and duly sworn, he would testify that on May 29, 1966, the defendant WILLIAM EDWARD ROSE, returned to and entered the United States from Mexico by entering at San Ysidro (San Diego) in San Diego County in the Southern Division of the Southern District of California, and made said entry without registering or surrendering the certificate as required by Title 18, U.S.C., Section 1407.

It was further stipulated and agreed that if PAUL R. SALERNO, M.D., were called to testify, he would state that on May 29, 1966, he observed three recently made needle

Appellant was thereafter arraigned and subsequently filed a motion to dismiss indictment and motion to strike portions of the indictment (C.T., p.4, 5), which motions were predicated on the ground that the phrase "and a man" was indefinite, and duplicous, and that the indictment and the statute upon which it was founded was violative of the privilege against self-incrimination, of the Fifth Amendment to the Constitution, and the prohibition against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution (C.T., p.4, 5). A hearing was had on said motions and following oral arguments the motions were dismissed (A.C.T., p.6).

On August 18, 1966, jury trial was waived and the case was heard on stipulated facts and decided on the same day (R.T., p.4-6). The stipulated facts (C.T., p.14, 15) show that if MCKEEN v. KELY, Jr., was called as a witness and duly sworn, he would testify that on May 17, 1966, the defendant WILLIAM EDWARD COTT, returned to and entered the United States from Mexico by entering at San Ysidro (San Diego) in San Diego County in the Southern Division of the Southern District of California, and made said entry without registering or invalidating the certificate as required by Title 18, U.S.C., Section 1427.

It was further stipulated and agreed that if JOHN R. SALTSMAN, M.D., were called to testify, he would state that on May 20, 1966, he observed three recently made needle

marks and five other needle marks upon said defendant's arms, and that it was his opinion that the said defendant was under the influence of narcotic drugs at the time of said examination.

Following the entering of the stipulated facts, appellant once again asserted the invalidity of the statute and the indictment under which defendant was being prosecuted, and asked for the court to dismiss the case. (R.T., p. 5, 6). Whereupon the judge stated:

> "...this is one of the most salutary statutes we have on the books today. It has saved more people from themselves and has led to the discovery of narcotics, narcotic traffic, and without it I think we would be very hard put to enforce the law relative to importation of narcotics, and I believe that it also serves a great purpose in preventing the continued use of narcotics by persons who are apprehended, and I have previously held that the Statute is not vague or uncertain and that it is constitutional and, therefore, on the stipulation I will find the defendant guilty."(.R.T., p.6).

Sentencing was thereupon held on September 8, 1966, and the defendant adjudged to be suitable for handling under the Federal Youth Correction Act, and pursuant to Title 18, U.S.C., Section 5010(a), defendants sentence was suspended and he was placed on probation for five years. (C.T., p.16).

V.

ARGUMENT

A. TITLE 18, U.S.C., SECTION 1407, IS UNCONSTITUTIONAL WHEN APPLIED TO APPELLANT IN THAT THE PHRASE "USER" IS NOT SUFFICIENTLY DEFINATE TO APPRISE

marks and five other needle marks upon said defendant's arms and that it was his opinion that the said defendant was under the influence of narcotic drugs at the time of said examination.

Following the entering of the stipulated facts, appellant once again asserted the invalidity of the statute and the indictment under which defendant was being prosecuted, and asked for the court to dismiss the case. (R.T., p. 5, 6). Whereupon the judge stated:

> "...This is one of the most salutary statutes we have on the book today. It has saved many people from themselves and has led to the discovery of narcotics, narcotic traffic, and without it I think we would be very hard put to achieve the low relative to importation of narcotics, and I believe that it also serves a great purpose in preventing the continued use of narcotics by persons who are apprehended, and I have previously held that the statute is not vague or uncertain and that it is constitutional and, therefore, on the stipulation I will find the defendant guilty." (R.T., p. 6).

Sentencing was thereupon held on September 8, 1964, and the defendant adjudged to be suitable for boarding under the Federal Youth Correction Act, and pursuant to TITLE 18, U.S.C., Section 5010(a), defendant sentence was suspended and he was placed on probation for five years. (C.T., p. 18).

V.

CONCLUSION

A. TITLE 18, U.S.C., SECTION 5010, IS UNCONSTITUTIONAL THEN APPLIED TO APPELLANT; IN THAT THE PHRASE "WHEN" IS NOT SUFFICIENTLY DEFINABLE TO APPLY

HIM OF THE PROHIBITED CONDUCT NOR TO SUPPLY A SUFFICIENTLY DEFINITE STANDARD TO MEASURE HIS GUILT OR INNOCENCE.

Appellant has resisted the constitutionality of the statute on the basis that it is vague and ambiguous from the very beginning, having prior to plea entered a Motion to Strike that portion of the indictment that charged him as a "user", and continued to assert this position up to and during trial.

The United States Supreme Court has, on numerous occasions, struck down both Federal and State statutes, for failure to meet an objective standard which would apprise the public of the conduct which is proscribed. In Bouie v. City of Columbia, 84 S.Ct. 1697 (1964), the court defined the standard of definiteness to be applied in testing penal statutes:

> "The basic principal that a criminal statute must give fair warning of the conduct it makes a crime has often been recognized by this court. As was said in United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989,
>
> > 'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'
> >
> > Thus we have struck down a state criminal statute under the Due Process Clause where it was not sufficiently explicit to inform those who are subject to it what conduct on their part will

> render them liable to its penalties.' Connally v. General Construction Company Company, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322.
>
> We have recognized in such cases that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law' ibid., and that 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids'. Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888."

The controlling case in determining the constitutionality of Title 18, U.S.C., Section 1407, United States v. Eramdjian, 155 F. Supp. 914, held that the term "addict" was sufficiently definite to constitute an objective standard. However, that case specifically left open the question of whether the phrase "user" was unconstitutionally vague.

Appellant submits that the phrase "user" is not sufficiently precise to allow one to predicate his behaviour upon its meaning. Use is in essence an act but the phrase "uses" applied in Title 18, U.S.C., Section 1407, indicates that some sort of consistent behaviour, short of addiction, is the basis of its classification. Thus the problem that confronts one is whether a single use requires registration, or whether the statute is aimed at those who have used narcotic drugs many times and who are

> rather than liable to the penalties.' Connally v. General Construction Company, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322.
>
> We have recognized in such cases that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law' Ibid., and that 'No man may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids'. Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888.

The controlling case in determining the constitutionality of Title 18, U.S.C., Section 1407, United States v. Evansville, 121 F. Supp. 324, held that the term "addict" was sufficiently definite to constitute an objective standard. However, that case specifically left open the question of whether the phrase "user" was unconstitutionally vague.

Appellant submits that the phrase "user" is not sufficiently precise to allow one to predicate his behavior upon its meaning. This is in essence an act for the phrase "user" applied in Title 18, U.S.C., Section 1407, indicates that some part of consistent behavior, short of addiction, is the basis of its classification. Thus the problem that confronts man is whether a single use requires rehabilitation, or whether the effort is aimed at those who have used narcotic drugs many times and who are

in danger of becoming addicted thereto. Therefore, the Court, the jury and the public at large are left to conjecture as to the precise meaning of the term and as to whether their present or contemplated conduct falls within the prohibitions contained in the statute.

It would further seem that the question of vagueness takes on added significance when the conduct proscribed directly infringes upon the exercise of personal freedoms which are protected by the Constitution of the United States. Thus, recognizing that the right to travel is a personal freedom guaranteed to all citizens through the Fifth Amendment, an attempt to curtail the exercise of this right must not only represent a valid and vital interest of national security, but it must also represent a clear and careful articulation of such legislative power.

B. REQUIRING APPELLANT ON ENTERING AND LEAVING THE UNITED STATES TO ADMIT, UNDER PENALTY OF THREATENED IMPRISONMENT, THAT HE IS A USER OF OR ADDICTED TO NARCOTICS CONTRAVENES THE RIGHTS GUARANTEED TO HIM BY THE CONSTITUTION.

The full range of liberties guaranteed under the Fifth Amendment have never been enumerated nor would it seem reasonable to do so. However, the concept of the right to travel has been recognized as an essential element of theFifth Amendment freedoms. In Kent v. Dulles, 357 U.S. 116 (1958), the court stated that:

--

in danger of becoming additional targets. Therefore, the Court, the jury and the public at large are left to conjecture as to the precise meaning of the term and as to whether their present or contemplated conduct falls within the prohibitions proscribed in the statute.

It would further seem that the question of vagueness takes on added significance when the conduct proscribed directly infringes upon the exercise of personal freedoms which are protected by the Constitution of the United States. Thus, recognizing that the right to travel is a personal freedom guaranteed to all citizens through the Fifth Amendment, an attempt to curtail the exercise of this right must not only represent a valid and vital interest of national security, but it must also represent a clear and careful articulation of such legislative power.

B. REPRESSING APPEARANCE OF MATERIAL AND LEAVING THE UNITED STATES TO ARMIT, CONTRA PROBITY OF TERRITORIES DEPENDENCY, THAT IS IT A CRIME BY AN AGENTS TO ENGAGE IN ACTIVITIES CONTRADICTS THE RIGHTS GUARANTEED TO MEN BY THE CONSTITUTION.

The full range of liberties guaranteed under the Fifth Amendment have never been enumerated nor would it seem reasonable to do so. However, the concept of the right to travel has been recognized as an essential element of the Fifth Amendment freedoms. In Zemel v. Rusk 381 U.S. 116 (1965), the Court stated that:

> "The right to travel is a part of the liberty of which the citizen cannot be deprived without due process of law under the Fifth Amendment.... Freedom of movement across frontiers in either direction and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country maybe as close to the heart of the individual as the choice of what he eats or wears or reads. Freedom of movement is basic in our scheme of values."

It should be noted that a month after the decision in Kent v. Dulles, supra, President Eisenhower issued a message to Congress stating that:

> "Any limitation on the right to travel Can only be tolerated in terms of overriding requirements of our national security."
> Message from the President, House Document No. 417, 85th Congress, 2nd Session; 104 Congressional Record 13046.

Recognizing that the liberties guaranteed under the Fifth Amendment cannot be restricted without due process of law, the question remains what statutory standards are such that they avoid the claim of unreasonable and arbitrary use of power. In Aptheker v. Secretary of State, 378 U.S. 500 (1964), a case holding that a federal statute prohibiting the issuance of a passport to a member of the Communist Party was unconstitutional in that it unduly restricted the fundamental liberties of a citizen to travel, the court said about the statute therein that:

> "The section, judged by its plain import

"The right to travel is a part of the liberty of which the citizen cannot be deprived without due process of law under the Fifth Amendment....
Freedom of movement across frontiers in either direction and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country may be an essential part of the liberty of the individual as the choice of what he eats or wears or reads. Freedom of movement is basic in our scheme of values."

It should be noted that a month after the decision in Kent v. Dulles, supra, President Eisenhower issued a message to Congress stating that:

"Any limitation on the right to travel can only be tolerated in terms of overriding requirements of our national security."

Lessner from the President, Hyde Park, N.Y., July 1958 Congress, 104 Congressional Record 14 Congressional Record 14.

Recognizing that the liberties guaranteed under the Fifth Amendment cannot be restricted without due process of law, the question remains what statutory standards are such that they avoid the claim of unreasonable and arbitrary use of power. In Kilbourn v. Thompson, 103 U.S. 168 (1881), a case holding that a federal statute prohibiting the issuance of a passport to a member of the Communist Party was unconstitutional in that it unduly restricted the fundamental liberties of a citizen to travel, the court said about the statute therein that:

"The section, judged by its plain meaning

> and by the substantive evil which Congress sought to control, sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment. The prohibition against travel is supported only by a tenuous relationship between the fact of organizational membership and the activity Congress sought to proscribe. The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individuals knowledge, activity, committment, and purposes in and places for travel. The section therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil', cf. Cantwell v. Connecticut, 310 U.S., at 307, yet here as elsewhere, prescision must be the touchstone of legislation so affecting basic freedoms, N.A.A.C.P. v. Button, 371 U.S. at 438.

Assuming that there is a vital national policy to be accomplished through the control of narcotic traffic, it is clear that such interest can only be achieved through a statute that is precisely and narrowly drawn such that the freedoms guaranteed to each citizen through the Fifth Amendment are not infringed by the broad and far reaching consequences of an inarticulate statute. It is clear that Title 18, U.S.C., Section 1407, prohibits all travel outside the United States to any place for any reason, unless one, who is within its classification, has registered with a Customs official. Such registration bears no relationship to the activity or purposes contemplated by the prospective traveler during his journey and its only possible intent is to facilitate the surveillance and observation of those who might

and by the substantive evil which Congress sought to control, namely the widely and too individualistically across the liberty guaranteed in the Fifth Amendment. The prohibition against travel is supported only by a tenuous relationship between the fact of organizational membership and the actively dangerous weight to permits. The broad and crushing prohibition individualistically excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purpose in and plans for travel. The section therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil', cf. Cantwell v. Connecticut, 310 U.S., at 307, yet here as elsewhere, precisely must be the touchstone of legislation so affecting basic freedom, N.A.A.C.P. v. Button, 371 U.S. at 438.

Assuming that there is a vital national policy to be accomplished through the control of narcotic traffic, it is clear that such interest can only be achieved through a statute that is precisely and narrowly drawn such that the freedoms guaranteed to each citizen through the Fifth Amendment are not infringed by the broad and far reaching consequences of an inarticulate statute. It is clear that Title 18, U.S.C., Section 1401, prohibits all travel outside the United States to any place for any reason, unless one, who is within its classification, has registered with a Customs official. Such registration bears no relationship to the activity or purpose contemplated by the prospective traveler during his journey and its only possible intent is to facilitate the surveillance and observation of those who might

possibly be involved in the illicit international traffic in drugs.

The trial judge indicated thatthis statute leads to the discovery of narcotics and narcotic traffic as well as providing a method whereby the Government helps narcotic users or addicts to help themselves (R.T., p.6). Accepting each justification for the statute on its own merits, it may readily be seen that none of the rationale is an acceptable nor a constitutional basis for the implementation of such a statute. Accepting the trial judge's statement that the statute is a tool in the rehabilitation of narcotic offenders, it must be noted that travel by the restricted class of persons is not completely eliminated, since travel is only invalid for those persons who fail to register with a Customs official. Following registration, one may travel as he pleases indulging in any type of conduct he pleases, and surely, if one is addicted to narcotics, the mere imposition of the requirement of registration is not going to cause him to forego such addiction. Therefore, the only meaning attributable to such a comment is that the imprisonment for failure to register as provided in the statute will initiate a withdrawl and complete recovery from the addiction to narcotics.

The statute is plainly penal in nature and rehabilitation of narcotic offenders through imprisonment is

possibly be involved in the illicit international traffic in drugs.

The trial judge instructed strictly against leads to the discovery of narcotics and narcotic traffic as well as providing a medical adversary the Government judge narcotics or addicts to help themselves (R.I., p.6). Accepting such justification for the statute on its own merits, it may readily be seen that none of the reasons is an acceptable nor a constitutional basis for the implementation of such a statute. Accepting the trial judge's statement that the statute is a tool in the rehabilitation of narcotic addicts, it must be noted that travel by the restricted class of persons is not completely eliminated, since travel is only invalid for those persons who fail to register with a Treasury official. Following registration, one may travel as he pleases indulging in any type of conduct he pleases, and surely, if one is addicted to narcotics, the mere imposition of the requirement of registration is not going to cause him to forego such addiction. Therefore, the only meaning attributable to such a requirement is that the imprisonment for failure to register as provided in the statute will institute a withdrawal and complete recovery from the addiction to narcotics.

The statute is plainly penal in nature and rehabilitation of narcotic addicts through imprisonment is

patently violative of the Eighth Amendment of the Constitution prohibiting cruel and unusual punishment. This was recognized by the Supreme Court of the United States in Robinson v. California, 307 U.S. 660 (1962) where the court, in holding the penal provisions of Section 11721 of the California Health & Safety Code invalid, stated:

> "It is unlikely that any State at this moment in history would attempt to make it a criminal offense for aperson to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement or sequestration, but in light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendment.
>
> We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a State law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behaviour there, inflicts cruel and unusual punishment in violation of the Fourteenth Amendment.

Clearly then any attempt to characterize the statute as rehabilitation-oriented would meet the mandate that

patently violative of the Eighth Amendment of the Constitution prohibiting cruel and unusual punishment. This was recognized by the Supreme Court of the United States in Robinson v. California, 370 U.S. 660 (1962) where the court, in holding that the penal provisions of Section 11721 of the California Health & Safety Code invalid, stated:

> "It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But in light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendment.
>
> We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a State law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts cruel and unusual punishment in violation of the Fourteenth Amendment.

Clearly then any attempt to characterize the statute as rehabilitation-oriented would meet the mandate that

penal provisions for narcotics addiction or use are violative of the constitutional provision against cruel and unusual punishment.

However, if the statute is to be construed as attempting to prevent the importation of narcotics in order to protect the public at large from the evils accompanying said introduction, then the statute violates the provisions of the Fifth Amendment of the Constitution that provides that no person shall be required to incriminate himself. It appears that the purposes ascribed to the statute in this sense could be carried out only by utilizing the registration in such a manner that further observation and surveillance of the registrant is possible.

The case of United States v. Eramdjian, 155 F.Supp. 914, which held that the statute now in question was constitutional, discussed the problem of self-incrimination involved in registering pursuant to Title 18, U.S.C., Section 1407 and stated that:

> "The privilege against self-incrimination does not extend to matters which might tend to incriminate a witness under the laws of another jurisdiction. United States v. Murdock (1931), 284 U.S. 141, 149, 52 S.Ct. 63, 76 L.Ed. 210; Feldman v. United States, (1944) 322 U.S. 487, 64 S.Ct. 1082, 88 L.Ed. 1408.

This same reasoning was relied upon in other cases questioning the constitutionality of Title 18, U.S.C., Section 1407, namely Reyes v. United States, 258 Fed.2d 744

penal provisions for successive violations or use are violations of the constitutional provision against cruel and unusual punishment.

However, if the statute is to be construed as attempting to prevent the importation of narcotics in order to protect the public at large from the evils accompanying said importation, then the statute violates the provisions of the Fifth Amendment of the Constitution that provides that no person shall be required to incriminate himself. It appears that the purposes sought to be attained in this manner could be carried out only by utilizing the regulation in such a manner that further observation and surveillance of the regulations is possible.

The case of United States v. Kirschman, 111 F.Supp. 914, which held that the statute now in question was unconstitutional, discussed the problem of self-incrimination involved in requiring persons to file U.S.C., Section 1407 and stated that:

> "The privilege against self-incrimination does not extend to witnesses which might tend to incriminate a citizen under the laws of another jurisdiction. United States v. Murdock (1931), 284 U.S. 141, 52 S.Ct. 63, 76 L.Ed. 210; Feldman v. United States, (1944) 322 U.S. 487, 64 S.Ct. 1082, 88 L.Ed. 1436."

This same statutory provision in other cases questioning the constitutionality of Title 26, U.S.C., Section 1407, namely Hayes v. United States, 390 F.2d 314

(1958), and Palmas v. United States, 261 Fed 2d 93 (1958). It also should be noted that these same cases were relied upon by the United States Attorney General in opposing the appellant's Motion to Dismiss the Indictment (C.T., p. 13).

However, the case of Murphy v. Waterfront Commissioner of New York, 378 U.S. 52 (1964), held that the priviledge against self-incrimination protects a person against incriminating himself under the laws of a sovereign different from that compelling the incriminating statement. The court therein stated:

> "We reject-as unsupported by history or policy-the deviation from that construction only recently adopted by this Court in United States v. Murdock, supra, and Feldman v. United States, supra. We hold that the constitutional priviledge against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.

Although the court in United States v. Eramdjian, 155 F. Supp. 914 (1957), interposed that no criminal case was pending and that no prosecution can be based upon registration alone, this patently begs the question in light of the decision handed down by this very court in Russell v. United States, 306 Fed 2d 402 (9th Cir., 1962). In striking down a portion of the Federal Firearms Act as being violative of the privilege against self-incrimination, the court stated:

(1975), and Fisher v. United States, 425 Fed 2d 91 (1970).

It also should be noted that these same cases were relied upon by the United States Attorney General in supporting the appellant's motion to dismiss the indictment (U.S., p. 13).

However, the case of Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964), held that the privilege against self-incrimination protects a person against incriminating himself under the laws of a sovereign different from that compelling the incriminating statement. The court stated:

> "A witness may be compelled by State policy--the decision from that constitutes only recently adopted by this Court in United States v. Murdock, supra, and Malloy v. United States, supra. We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.

Although the court in United States v. Kordella, 155 F. Supp. 314 (1957), interpreted that an criminal case was pending and that no prosecution can be based upon testimony alone, this patently begs the question in light of the decision handed down by this very court in Marchetti v. United States, 390 Fed 2d 402 (9th Cir., 1968). In striking down a portion of the Federal Firearms Act as being violative of the privilege against self-incrimination the court stated:

"It has been held that the priviledge against self-incrimination extends to information which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118. This being so, it cannot be doubted that the priviledge extends to information which, by operation of statute, prima facie establishes guilt. The fact that, under stated circumstances, the registrant may be able to convince the jury that his possession was not in violation of the Act, is immaterial. The priviledge may be claimed by one who is innocent but who reasonably could fear that disclosure of the information would result in criminal charges against which he would have to defend himself. See Blau v. United States, 340 U.S. 159, 161, 71 S.Ct. 223, 95 L.Ed. 170."

Similarly the United States Supreme Court held in Hoffman v. United States, 341 U.S. 479, 487, that:

"To sustain the priviledge, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

The court in United States v. Eramdjian, 155 F. Supp. 914 (1957), likened registration pursuant to Title 18, U.S.C., Section 1407, to the filing of income tax returns in that there was no threat of prosecution, nor a subpoena or a court order compelling registration, and that the only possible coercion was compliance with the law. However, Albertson and Proctor v. Subversive

"It has been held that the privilege against self-incrimination extends to information which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118. This being so, it cannot be doubted that the privilege extends to information which, by operation of statute, might furnish evidence of the fact that, under stated circumstances, the witnesses may be held to convict the jury that his prosecution was not in violation of law, is immaterial. The privilege may be claimed by one who is innocent for he may reasonably avoid for that disclosure of the information would result in criminal charges against which he might have to defend himself. Ohio v. United States, 340 U.S. 19, 19, 71 S.Ct. 111, 95 L.Ed. 119."

Similarly the United States Supreme Court held in

Malloy v. United States, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. 653:

"To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

The court in United States v. Kordline, 153 F. Supp. 914 (1957), ithened application pursuant to Title 18, U.S.C., section 1407, to the filing of issues and returns in that there was no cause of prosecution, and a subpoena or a court order compelling registration, and that the only possible question was compliance with the law. However, Albertson and Prather v. Internal

Activities Control Board, 382 U.S. 70 (1965), in striking down the requirement that individual members of the Communist Party must register, stated that:

> "...if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes."
>
> ...
>
> "...the question in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners claims are not asserted in an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the forms questions in context might involve the petitioners in the admission of a crucial element of a crime."

This case went on to hold that the mere fact that the admission would provide the authorities with an investigatory lead and would not of itself be a confession or admission of criminal activity, it would be sufficent to strike the statute requiring such registration.

In view of the Murphy v. Waterfront Commissioner of New York, 378 U.S. 52 (1964), it would therefore appear that no statement made to either federal or state authorities may be used which would furnish an investigatory lead or an element or link in the chain of

Activities Control Board, 366 U.S. 70 (1961), in striking down the requirement that individual members of the Communist Party must register, stated that:

> "...if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes."
>
> ...
>
> "...the question in the income tax return were material to their plea and directed at the public at large, yet here they are directed at a highly selective group inherently subject to criminal sanctions. Furthermore, claims are asserted in an association highly non-criminal and regulatory area of inquiry; but applied as inquiry is to a well organized risk criminal association, where response to any of the three questions is material that involves the petitioner in the admission of a crucial element of a crime."

This case went on to hold that the mere fact that the admission would prevent the association with an investigatory load and would not of itself be a confession or admission of criminal activity, it would be sufficient to strike the statute requiring such registration.

In view of the Marchetti v. United States, 390 U.S. 39 (1968), it would therefore appear that an statement made to either federal or state authorities may be used which would furnish an investigatory load or an element or link in the chain of

evidence needed to prosecute a party for either a federal or state crime, without granting the declarant complete immunity.

The mandate of the Fifth Amendment of the Constitution is clear- no man shall be compelled to be a witness against himself. The requirement of registration pursuant to Title 18, U.S.C., Section 1407, clearly violates this constitutional command. One need look no further than the federal law to observe that registration provides the authorities with either a crucial element of a crime, a link in the chain of evidence needed to prosecute, or an investigatory lead in pursuit of such prosecution.

There are various manifestations of disobedience to Title 18, U.S.C., Section 1407, comprised of the following:

1-Attempting to leave the United States without registering;

2-Leaving the United States without registering;

3-Attempting to enter the United States without registering;

4-Entering the United States without registering;

5-Attempting to Enter the United States without surrendering the registration certificate; and

6-Entering the United States without surrendering

evidence tending to preclude a jury for either a federal or state crime, without granting the defendant complete immunity.

The mandate of the Fifth Amendment of the Constitution is clear- no one shall be compelled to be a witness against himself. The requirement of registration pursuant to Title 18, U.S.C., Section 1401, clearly violates this constitutional command. The need look no further than the federal law to assure that registration provides the authorities with either a crucial element of a crime, a link in the chain of evidence needed to prosecute, or an investigatory lead in pursuit of such prosecution.

There are various constitutions of discretion in Title 18, U.S.C., Section 1401, comprised of the following:

1-Attempting to leave the United States without registering;

2-Leaving the United States without registering;

3-Attempting to enter the United States without registering;

4-Entering the United States without registering;

5-Attempting to enter the United States without murmuring the registration certificate; and

6-Entering the United States without manifesting

the registration certificate.

Thus, an admission and registration as an addict and a user of narcotics upon entering the United States would in turn entail an admission of attempting to and leaving the United States without registering subjecting one to the penalties imposed by the statute under discussion. Also, it must be noted that once a party has registered, past records could reveal that the party in question has failed to register on other occasions when he left the country.

Other Federal statutes also must be cited in that registration pursuant to Title 18, U.S.C., Section 1407, would provide the Federal authorities with vital evidence in prosecuting actions thereunder.

Title 21. U.S.C., Section 174 providing punishment for smuggling heroin across international borders, and Title 21, U.S.C., Section 178, providing for punishment for being in possession of opium while crossing international borders, are examples of statutes under which appellant may be convicted following registration at an international border. Numerous cases considered in this court have shown that government attorneys rely on use or addiction to show knowledge of the presence of contraband in a vehicle. It appears inescapable that the use of registration in this manner is a clear violation of the principle established by this court in Russell v. United States, 306 F.2d 402 (9th Cir., 1962).

the registration certificate.

Thus, an admission and registration as an addict and a user of narcotics upon entering the United States would in turn entail an admission of attempting to and leaving the United States without registering subjecting one to the penalties imposed by the statute under discussion. Also, it must be noted that once a party has registered, past records could reveal that the party in question has failed to register on other occasions when he left the country.

Other Federal statutes also must be cited in that registration pursuant to Title 18, U.S.C., Section 1407, would provide the Federal authorities with vital evidence in prosecuting actions thereunder.

Title 21, U.S.C., Section 174 providing punishment for smuggling heroin across international borders, and Title 21, U.S.C., Section 176, providing for punishment for being in possession of opium while crossing international borders, are examples of statutes under which appellant may be convicted following registration at an international border. Numerous cases considered in this court have shown that government attorneys rely on use or admission to show knowledge of the presence of contraband in a vehicle. It appears inescapable that the use of registration in this manner is a clear violation of the principle established by this court in Marzell v. United States, 305 F.2d 148 (5th Cir., 1962).

There are a number of California statutes which present danger to one who registers at the international border, the most obvious of which is Section 11721 of the California Health and Safety Code, which provides for punishment in the event that one is found to be using or under the influence, or addicted to, the use of narcotics. The prerequisite to compulsory registration at the border is that one be a user of or addicted to narcotic drugs; thus registration provides an admission of a crime under the California law and subjects the registrant to the highly probable circumstance of being prosecuted for obeying the command of the law of another jurisdiction. This is purely and simply a direct violation of the principle established in Murphy v. Waterfront Commissioner of New York Harbor, 378 U.S. 52 (1964).

Another state prosecution which might emanate from registration is a violation of Section 11500 of the California Health and Safety Code, which provides for imprisonment of up to 10 years in the state prison for possession of narcotics. Registration entails an admission of either use of or addiction to, narcotics and although the regist ation itself does not admit the possession of narcotics, it does supply the authorities with an investigatory lead which fact is in direct violation of the rules established in Albertson and Proctor v. Subversive Activities Control Board 382 U.S. 70 (1965).

There are a number of California statutes which present danger to one who registers at the international border, the most obvious of which is Section 11721 of the California Health and Safety Code, which provides for punishment in the event that one is found to be using or under the influence, or addicted to, the use of narcotics. The prerequisite to compulsory registration at the border is that one be a user of or addicted to narcotic drugs; this registration provides an admission of a crime under the California law and subjects the registrant to the highly probable circumstance of being prosecuted for obeying the command of the law of another jurisdiction. This is purely and simply a direct violation of the principle established in People v. Winterhoe (Commissioner of New York Harbor), 319 U.S. 52 (1944).

Another state prosecution which might emanate from registration is a violation of Section 11500 of the California Health and Safety Code, which provides for imprisonment of up to 10 years in the state prison for possession of narcotics. Registration entails an admission of either use of or addiction to, narcotics and although the registrant himself does not admit the possession of narcotics, it does supply the authorities with an incriminatory lead which leads to a direct violation of the rules established in Albertson and Fredeen v. Subversive Activities Control Board 382 U.S. 70 (1965).

Section 23105 of the California Vehicle Code presents another danger to one who registers at the international border. This particular statute provides for prosecution for driving a vehicle while being addicted to narcotics. It seems highly possible that registration would provide the California authorities with a vital element in their investigatory procedures subjecting appellant to a risk which violates the principles adopted by the United States Supreme Court.

Perhaps the greatest danger confronting appellant had he registered was a proceeding under Section 3100, et seq. of the California Welfare and Institutions Code (formerly Sections 6500, et seq., of the California Penal Code). This Section provides that a person not charged with a crime may be involuntarily committed to a state facility for the treatment of narcotic addiction for a period up to 10 years. Since the incarceration is involuntary, it seems highly unrealistic to assert that a person could be so institutionalized without providing him with the full measure of his constitutional rights. Although the California Supreme Court has upheld the constitutionality of the statute providing for involuntary committment of persons not charged with a crime, that court has also recognized that there are numerous safeguards for one in such a proceeding, including compulsory arraignment, the right to have counsel appointed if the respondent be an

Section 2105 of the California Vehicle Code presents another danger to one who registers at the international border. This particular statute provides for prosecution for driving a vehicle while being addicted to narcotics. It seems highly possible that registration would provide the California authorities with a vital element in their inquisitory procedures subjecting appellant to a trial which violates the principles adopted by the United States Supreme Court.

Perhaps the greatest danger confronting appellant had he registered was a proceeding under Section 3100, et seq. of the California Welfare and Institutions Code (formerly Sections 5500, et seq., of the California Penal Code). This section provides that a person not charged with a crime may be involuntarily committed to a state facility for the treatment of narcotic addiction for a period up to 10 years. Since the incarceration is involuntary, it seems highly unrealistic to assert that a person could be so institutionalized without providing him with the full measure of his constitutional rights. Although the California Supreme Court has upheld the constitutionality of the statutes providing for involuntary commitment of persons not charged with a crime, that court has also recognized that there are numerous safeguards for one in such a proceeding, including compulsory assistance, the right to have counsel appointed if the respondent be an

indigent and the right to be personally present at all stages of the proceedings. In People v. Victor, 42 Cal. Rptr. 199 (1965), the California Supreme Court, in discussing the rights of one faced with possible committment to a state institution, made the following pertinent observations:

> "...In an earlier stage of the Gross case (Gross v. Superior Court) (1954) 42 Cal.2d 816, 821 (5a-5b), 270 P.2d 1025), the petitioners sought mandate to compel preparation at the state's expense of transcripts of the proceeding in which he was adjudged a sexual psychopath. We granted the relief prayed for, reasoning as follows: "The proceeding is not strictly a criminal case... yet it is to be noted it has some of the features pertinent to such cases. The state is defendant's opponent. The one sought to be declared a sexual psychopath is entitled to bail pending determination. [Citations]. He is entitled tobe present at the hearing and if he has no counsel the court may appoint one for him or order the public defender to serve. [Citations]. His liberty is at stake. Since these things are matters pertaining to the protection and rights of a person similar to one involved in a criminal case we believe he falls within the terms of Section 69952 of the Government Code [providing for payment of transcript fees out of the county treasury]. See in Re Paiva, 31 Cal.2d 503, [190 P.2d 604]; People v. Smith, 34 Cal.2d 449 [211 P.2d 561]. Similar considerations obtain here and lead us to the same conclusion, i.e., that persons involuntarily committed to the custody of the Director of Corrections under this program have the right to a free transcript on an appeal from the order of committment."

Therefore, although the proceeding is neither wholly penal nor wholly civil, the courts have recognized that the proceeding is of such a nature that rights afforded to one

indigent and the right to be personally present at all stages of the proceedings. In People v. Vietro, 42 Cal. Rptr. 189 (1965), the California Supreme Court, in discussing the rights of one faced with possible commitment to a state institution, made the following pertinent observation:

"...In no written scope of the Sixth Amendment (People v. Burgins Court) (1974) 12 Cal.3d 64, 114 Cal.Rptr. 97, 524 P.2d 1281), the petitioners might require to equal protection at the state's expense of trans-criptions of the proceeding is which be was entitled a mental psychiatrist. We granted the relief prayed for, reasoning as follows: "The proceeding in not strictly a criminal case... yet it is to be noted it has some of the features pertinent to such cases. The state is defendant's opponent. The proceeding to be declared a mental psychopath is auxiliary to bail pending determination. (Citations). An is within some protection as the hearing and it is not so critical the county may commit one for him or order the public defender to serve. (Citations). The liberty is at stake. Since these things are matters pertaining to the protection and rights of a person similar to one involved in a criminal case we believe he falls within the terms of section 4900 of the Government Code (providing for payment of transcript fees out of the county treasury). See in re Tyler, 31 Cal.2d 3, [166] P.2d 844; People v. Smith, 54 Cal.2d 44 [111 P.2d 321]. Whether conservatees stands here and head on the same specialist, i.e., that persons involuntarily committed to the custody of the director of corrections under this program have the right to a free transcript on an appeal from the order of commitment."

Therefore, although the proceeding is neither wholly penal nor wholly civil, the courts have recognized that the proceeding is of such a nature that rights attached to one

under a criminal proceeding are equally applicable in a proceeding instigated for the purpose of having one involuntarily committed to a facility designated by the Department of Corrections of the State of California. It seems inescapable that the privilege against self-incrimination is equally applicable in the committment proceeding since the other rights which have been recognized would be of little consequence if the full complement of criminal safeguards were not guaranteed. A selective approach as to the rights to be granted one in appellant's situation would represent an arbitrary and unreasonable classification the effects of which dilute the rights which are granted by the very fact that similar rights are denied.

The correctness of this position was recognized by the United States Supreme Court as early as 1886 in Boyd v. United States, 116 U.S. 616 (1886), in which it was held that the Fourth and Fifth Amendment protections against unreasonable searches and seizures and against compulsory self-incrimination applied to civil forfeiture actions. The court therein stated:

> "For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself', which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within

under a criminal proceeding are equally applicable in a proceeding instituted for the purpose of having one involuntarily committed to a facility designated by the Department of Corrections of the State of California. It seems inescapable that the privilege against self-incrimination is equally applicable in the commitment proceeding since the other rights which have been recognized would be of little consequence if the full complement of criminal safeguards were not guaranteed. A selective approach as to the rights to be granted one in appellant's situation would represent an arbitrary and unreasonable classification the effects of which dilute the rights which are granted by the very fact that similar rights are denied.

The correctness of this position was recognized by the United States Supreme Court as early as 1924 in Ford v. United States, 115 U.S. 404 (1924), in which it was held that the Fourth and Fifth Amendment protections against unreasonable searches and seizures and against compulsory self-incrimination applied in civil deportation actions. The court stated:

> For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are those which are made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself', which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within

the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal.

...If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants-that is, civil in form- can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. As shown in the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of Coffey v. United States, ante, 436; in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods, arising upon the same acts. As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of the opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment

the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is materially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of that term. We see also clearly of opinion that proceeding instituted for the purpose of depriving the proprietors of a number of articles by reason of offenses committed by them, though they may be civil in form, are in their nature criminal.

...If the government prosecutor elects to employ an indictment, and to file a civil information against the claimant-that is, civil in form-can he by this device take from the proceeding its criminal aspect and deprive the claimant of their immunities as citizens, and deliver them a prosecution of their private papers, or, as alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is a pleading and effect a criminal one. As shown in the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of Boyd v. United States, supra, 116; in which we decided that a proceeding as a criminal information was a good plea in bar as a civil information for the forfeiture of goods, arising upon the same facts. So, therefore, with the possible and forfeitures incurred by the commission of offenses against the law of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself and we are further of the opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment

> to the Constitution, and is the equivalent of a search and seizure- and an unreasonable search and seizure- within the meaning of the Fourth Amendment". 116 U.S. 633-635.

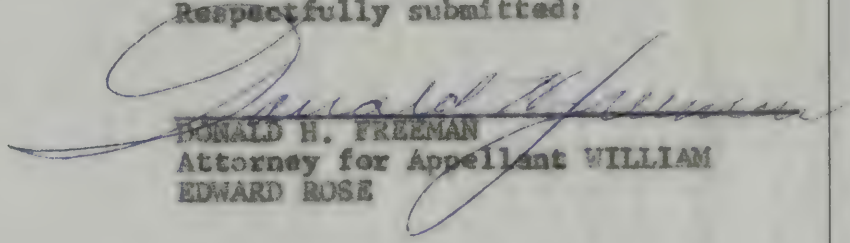
This principle, as set forth by the Supreme Court in 1886, was reiterated as recently as 1965 in 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, holding that the constitutional exclusionary rule applies to state forfeiture proceedings.

Appellant submits that the foregoing authorities permit no other conclusion than that requiring the appellant to register pursuant to Title 18, U.S.C., Section 1407, clearly contravened his privilege against self-incrimination.

VI.

For the foregoing reasons, it is respectfully submitted that conviction of appellant should be reversed and the cause remanded with instructions to dismiss.

Respectfully submitted:



DONALD H. FREEMAN
Attorney for Appellant WILLIAM EDWARD ROSE

to the Constitution, and is the prerequisite of a search and seizure and an unreasonable search and seizure within the meaning of the Fourth Amendment". 110 U.S. 651, 652.

This principle, as set forth by the Supreme Court in 1886, was reiterated as recently as 1963 in Ohio Ex rel. Eaton v. Tracey, 375 U.S. 493, holding that the constitutional exclusionary rule applies to state factfinding proceedings.

Appellant submits that the foregoing authorities provide no other conclusion than that requiring the appellant to register pursuant to Title 18, U.S.C., Section 1547, clearly contravened his protection against self-incrimination.

VIV

For the foregoing reasons, it is respectfully submitted that conviction of appellant should be reversed and the cause remanded with instructions to dismiss.

Respectfully submitted:

[illegible]
Attorney for Appellant [illegible]
[illegible]

CERTIFICATE

I, DONALD H. FREEMAN, certify, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those Rules.

DONALD H. FREEMAN
Attorney for Appellant
WILLIAM EDWARD ROSE

Title 18, U.S.C. Section 1407: Border crossing-narcotic addicts and violators

"(a) In order further to give effect to the obligations of the United States pursuant to the Hague convention of 1912, proclaimed as a treaty on March 3, 1915 (38 Stat. 1912), and the limitation convention of 1931, proclaimed as a treaty on July 10, 1933 (48 Stat. 1571), and in order to facilitate more effective control of the international traffic in narcotic drugs, and to prevent the spread of drug addiction, no citizen of the United States who is addicted to or uses narcotic drugs, as defined in section 4731 of the Internal Revenue Code of 1954, as amended (except a person using such narcotic drugs as a result of sickness or accident or injury and to whom such narcotic drug is being furnished, prescribed, or administered in good faith by a duly licensed physician in attendance upon such person, in the course of his professional practice) or who has been convicted of a violation of any of the narcotic or marihuana laws of the United States, or of any State thereof, the penalty for which is imprisonment for more than one year, shall depart from or enter into or attempt to depart from or enter into the United States, unless such person registers, under such rules and regulations as may be prescribed by the Secretary of the Treasury with a customs official, agent, or employee at a point of entry or a border customs station. Unless otherwise prohibited by law or Federal regulation such customs official, agent or employee shall issue a certificate to any such person department from the United States; and such person shall, upon returning to the United States, surrender such certificate to the customs official, agent, or employee present at the port of entry or border customs station.

(b) Whoever violates any of the provisions of this section shall be punished for each such violation by a fine of not more than $1,000 or imprisonment for not less than one nore more than three years, or both. Added July 18, 1956, c.629, Title II, § 201, 70 Stat. 574".

Title 18, U.S.C. Section 1407: Narcotic drugs-penalties and violations

"(a) In order further to give effect to the obligations of the United States pursuant to the Hague convention of 1912, concluded as a treaty on March 3, 1913 (38 Stat. 1912), and the Geneva convention of 1931, concluded as a treaty on July 13, 1933 (48 Stat. 1943), and in order to facilitate more effective control of the international traffic in narcotic drugs and to prevent the spread of drug addiction, no citizen of the United States who is addicted to or uses narcotic drugs, as defined in section 1751 of the Internal Revenue Code of 1954, or knowingly assists a person using such narcotic drugs as a result of sickness or accident or injury and to whom such narcotic drug is being furnished, prescribed, or administered in good faith by a duly licensed physician in attendance upon such person, in the course of his professional practice) or who has been convicted of a violation of any of the narcotic or marihuana laws of the United States, or of any State thereof, the penalty for which is imprisonment for more than one year, shall depart from or enter into the United States, unless such person registers, under such rules and regulations as may be prescribed by the Secretary of the Treasury with a customs official, agent, or employee as a pilot or entry or a border customs station. Unless otherwise prohibited by law or federal regulation such customs official, agent or employee shall issue a certificate to any such person departing from the United States; and such person shall, upon returning to the United States, surrender such certificate to the customs official, agent, or employee present at the port of entry or border customs station.

(b) Whoever violates any of the provisions of this section shall be punished for each such violation by a fine of not more than $1,000 or imprisonment for not less than one and not more than three years, or both. Added July 18, 1956, c.637, Title II, § 201, 70 Stat. 574".

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA }
COUNTY OF SAN DIEGO } SS.

LOIS FREEMAN after being first duly sworn, deposes and says:

That I am a citizen of the United States, over 18 years of age, a resident of the County of San Diego, and not a party to the within action. My business address is 345 East Eighth Street, National City, California, 92050.

I served the attached Appellant's Opening Brief by placing a true copy thereof in an envelope addressed to:

PHILLIP W. JOHNSON
Assistant United States Attorney
U.S. Courthouse Building
325 West "F" Street
San Diego, California

which envelope was then sealed and postage fully prepaid thereon and thereafter was on December 27, 1966, deposited in the United States mail at National City, California; there is delivery service by the United States Mail at theplace so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

Lois Freeman
LOIS FREEMAN
Affiant

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 27th DAY
OF DECEMBER, 1966

SYLVIA I. BOWMAN SMITH
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY

Sylvia I. Bowman Smith
NOTARY PUBLIC In and for said
County and State

SYLVIA I. BOWMAN SMITH NOTARY PUBLIC
My commission expires Aug. 22, 1967

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO) ss.

LOIS FREEMAN, after being first duly sworn, deposes and says:

That I am a citizen of the United States, over the age of 18, a resident of the County of San Diego, and not a party to the within action. My business address is 340 Ash Street, Escondido City, California, 92025.

I served the attached Appellant's Opening Brief by placing a true copy thereof in an envelope addressed to:

PHILLIP V. TRUSCOTT
Assistant United States Attorney
U.S. Courthouse Building
325 West "F" Street
San Diego, California

which envelope was then sealed and prepaid fully postage thereon and thereafter was on December 20, 1984, deposited in the United States mail at National City, California; there is delivery service by the United States Mail at places so addressed, or regular communication by mail between the place of mailing and the place so addressed.

LOIS FREEMAN
Affiant

SUZANNE BOWEN SMITH
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 20TH DAY
OF DECEMBER, 1984

NOTARY PUBLIC IN AND FOR THE STATE
County and State

My commission expires Jan. 1, 1987

NO. 21559

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM EDWARD ROSE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

NO. 21559

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM EDWARD ROSE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

TABLE OF AUTHORITIES

NO. 21559

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM EDWARD ROSE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in a one-count indictment following a non-jury trial.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 1407 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in a one-count indictment with failure of a narcotic addict and user (American citizen) to register and surrender a registration certificate upon return and entry into the United States at the port of San Diego (San Ysidro), California, in violation of Title 18, United States Code, Section 1407 [C. T. 3]. 1/

Appellant's Motion to Dismiss or Set Aside Indictment was denied on August 1, 1966 [C. T. 4; Supplemental Record, p. 2]. Court trial commenced on August 16, 1966, before United States District Judge Fred Kunzel, and appellant was found guilty as charged on that date [R. T. 4-6]. 2/

Thereafter, on September 8, 1966, imposition of sentence was suspended, and appellant was placed upon probation for five years [C. T. 16]. He subsequently filed a timely notice of appeal [C. T. 17].

III

ERROR SPECIFIED

Appellant has specified the following points upon appeal:

"1. The District Court erred in failing to

1/ "C. T." refers to the Clerk's Transcript.

2/ "R. T." refers to the Reporter's Transcript on Appeal.

strike from the indictment the portion thereof alleging that defendant-appellant was a 'user' of narcotics.

"2. The District Court erred in failing to dismiss the indictment.

"3. The statute under which defendant-appellant was indicted, tried and sentenced, to-wit: Title 18, U. S. C., Section 1407, is unconstitutional in whole or in part when applied to appellant." (Appellant's Opening Brief, p. 4.)

IV

STATEMENT OF THE FACTS

Appellant entered the United States from Mexico at San Ysidro, California, on May 29, 1966. He failed to register under Title 18, United States Code, Section 1407. At that time he was a citizen of the United States [C. T. 14-15].

Appellant was examined by Dr. Paul R. Salerno on the same date. Dr. Salerno observed three recently-made needle marks and five other needle marks upon appellant's arms, made other observations, and concluded that appellant was under the influence of narcotic drugs at the time of the examination. There was a stipulation concerning Dr. Salerno's qualifications as an expert in the matters involved in his testimony [C. T. 14-15].

V

ARGUMENT

A. SECTION 1407 OF TITLE 18, UNITED STATES CODE, IS NOT UNCONSTITUTIONALLY VAGUE.

Appellant contends that Section 1407 is unconstitutionally vague in regard to the term, "user". 3/ This argument was rejected in Palma v. United States, 261 F.2d 93 (5th Cir. 1958). In Palma the appellant unsuccessfully argued that Section 1407 and the regulations pursuant thereto "fail to define a proper standard of guilt by being vague and indefinite. . ." (note, pp. 94-95). The appellant's brief in Palma reveals that the question of alleged vagueness of the user term was raised in that appeal. 4/

The "uses" term compares favorably with many other words and phrases which have been upheld by the United States Supreme Court when attacked upon the ground of unconstitutional vagueness. A collection of a number of these cases appears in Jordan v. DeGeorge, 341 U.S. 223, footnote at pp. 231-32 (1951).

Since it is not difficult to conjure hypothetical factual situations in which nearly any criminal statute may be assailed with

---

3/ The statute actually employs the term, "uses".

4/ It is a proper practice to refer to appellate briefs in order to determine whether a particular question was raised upon appeal, e.g., Murphy v. Waterfront Comm'n., 378 U.S. 52, 65-66 (1964); Karrell v. United States, 247 F.2d 706, 709-10 (9th Cir. 1957).

allegations of uncertainty or ambiguity, it is not surprising that the courts have placed a narrow interpretation upon the vagueness doctrine. Thus it has been held that alleged uncertainty of language in one criminal statute "goes not to the sufficiency of the statute, but to the adequacy of the trial court's guidance to the jury by way of instructions in a particular case".

Scales v. United States, 367 U.S. 203, 223 (1961).

In Jordan, supra, the United States Supreme Court held that "difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness" (at p. 231).

This Court has held:

> "The fact that in some cases it may be difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense."
>
> Turf Center, Inc. v. United States, 325 F.2d 793, 795 (9th Cir. 1963).

If a blanket indictment of vagueness would be sufficient to nullify all statutes containing a hint of uncertainty of meaning, then we would no longer be able to state that the interpretation of statutes is a vital function of the courts. However, it should be added that appellee does not concede that the "uses" term is uncertain or vague. Furthermore, assuming arguendo that the "uses" term is unconstitu-

tionally vague, appellant may not complain, because the conviction may rest upon the alternative ground that appellant was a narcotics addict. The "user" term would then be surplusage. Surplusage in an indictment may be disregarded as immaterial.

Ford v. United States, 273 U. S. 593, 602 (1927).

B. SECTION 1407 OF TITLE 18, UNITED STATES CODE, DOES NOT VIOLATE THE PRIVILEGE AGAINST SELF-INCRIMINATION.

Appellant contends that the registration requirement of Section 1407 violates the Constitutional privilege against self-incrimination. The courts have consistently held otherwise.

Reyes v. United States, 258 F. 2d 774, 778-82 (9th Cir. 1958);

Palma v. United States, supra, 261 F. 2d 93, 95 (5th Cir. 1958);

United States v. Eramdjian, 155 F. Supp. 914, 925-29 (S. D. Cal. 1957). 5/

5/ The question of the constitutionality of Section 1407 is also before this Court in four other cases pending at the time of the preparation of this brief:

Sharon Jeanne Weissman v. United States, No. 19974;
Jimmie Merl Mason v. United States, No. 20233;
Conrad Allen v. United States District Court, No. 20948;
Willie Ray Spain v. United States, No. 20888.

Appellant contends that the law has changed, citing a number of cases, including Murphy v. Waterfront Comm'n., 378 U.S. 52 (1964); Russell v. United States, 306 F.2d 402 (9th Cir. 1962); Hoffman v. United States, 341 U.S. 479 (1951); and Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965). Each of these cases will be discussed below in order to analyze their possible impact upon the decisions in Reyes, Palma and Eramdjian.

1. The Effect of Murphy v. Waterfront Comm'n.

Murphy holds that the self-incrimination protection includes answers sought in a state proceeding if those answers tend to incriminate the witness in connection with a Federal criminal statute. The decision also holds that the same rule applies where the Federal government compels testimony which would be incriminatory in connection with state criminal legislation (p. 53, note 1).

There are several reasons for rejecting the theory that Murphy has silently overruled Reyes and Palma. In the first place, Murphy does not apply to Section 1407 because registration under that statute does not involve the admission of commission of any state crime. Registration is required of citizen narcotic addicts, users, and prior convicted violators. It is not a crime in California to have the status of an addict or user. While it is a misdemeanor to use narcotics in California, 6/ the Section 1407 registrant admits

6/ California Health and Safety Code, Section 11721.

no use within the state. Proof of venue is essential in a California criminal prosecution.

People v. Parks, 44 Cal. 105 (1872).

Appellant is incorrect in his assertion that it is a California crime to be addicted to the use of narcotics (Appellant's Opening Brief, p. 20).

Robinson v. California, 370 U.S. 660, 667 (1962).

Appellant states that "Perhaps the greatest danger confronting appellant had he registered" was a state commitment for treatment for narcotic addiction. 7/ However, such a proceeding is civil in nature, not criminal.

In Re De La O, 59 Cal. 2d 128 (1963), cert. denied, 374 U.S. 856 (1963);

1 San Diego Law Review 68-69.

A careful reading of the United States Supreme Court decision in Robinson, supra, leads to the clear conclusion that the Supreme Court also regards state compulsory confinement and treatment of narcotics addicts as a civil proceeding (at p. 665, note 7).

There can be no self-incrimination based upon fear of civil action in the courts.

Furthermore, assuming arguendo that registration would involve potential self-incrimination in regard to state law, the remedy would be in the protection of the registrant at the time of

---

7/ Appellant's Opening Brief, p. 21.

the attempted testimony in the state court. The undesirable alternative would be the elimination of Section 1407 in the face of the "strong presumption of constitutionality due to an Act of Congress", 8/ as well as the sacrifice of several analogous Federal registration statutes, depending upon the inclinations of the state legislatures in each of 50 states.

In Murphy, the Supreme Court held (at p. 79) that the witnesses in the state proceeding would be compelled to give the answers but that the Federal government would be prohibited from using the compelled testimony and its fruits in a Federal criminal prosecution. A similar protection could be invoked in regard to Section 1407 in the unlikely event that the state would attempt to offer compelled evidence in some subsequent criminal protection. Indeed, under the rule of Adams v. Maryland, 347 U.S. 179, 181 (1954), this protection already exists.

In Stone v. United States, 357 F.2d 257 (5th Cir. 1966), the appellant contended that registration under 26 U.S.C.A. 4411 and other statutes might serve as a "link in a chain" in regard to past crimes under another Federal statute. The Court indicated (at p. 259) that the question should be raised at the subsequent trial.

Even if it be assumed that Murphy overrules one of the arguments in Eramdjian and Reyes, there would be no effect upon the other alternative arguments expressed in those decisions.

8/ United States v. Di Re, 332 U.S. 581, 585 (1948).

2. The Effect of Russell v. United States and Hoffman v. United States.

In Russell, supra, this Court held that the firearm registration requirement of 26 U. S. C. A. 5841 was unconstitutional because the registrant would necessarily admit possession, and "proof of possession establishes prima facie, a violation of that section" (at p. 411). As a practical matter, every registrant would admit prima facie guilt. There is no comparison with Section 1407, because no Section 1407 registrant admits commission of any crime (except possibly under the prior convicted violator provision, which is not under attack in this appeal).

Appellant also quotes the "link-in-the-chain" discussion which appears in Russell and Hoffman, supra. It might be argued that registration would provide some "link-in-the-chain" leading to prosecution for another crime. This argument might be applied to all statutes which require registration or the completion of forms. To carry the argument to its logical extreme, if California should enact a law requiring persons in the southern part of the state to file state income tax returns in Los Angeles and persons in the north to file the returns in San Francisco, it could be argued that the Federal income tax laws would be unconstitutional because the compulsory acquisition of the Federal taxpayer's address would provide a "link-in-the-chain" in a state prosecution for failure to file the state tax return at the specified city. The Federal taxpayer's involuntary signature also might be a "link-in-the-chain"

in a future state forgery prosecution. These examples demonstrate the possible consequences of an unlimited extension of the "link-in-the-chain" principle. The courts have not gone so far.

The appellate courts have recently considered several cases in which the appellants unsuccessfully raised Fifth Amendment contentions in connection with statutes analogous to Section 1407. Under 21 U. S. C. A. 176a, and Title 19, United States Code, Sections 1459, 1461, 1484, and 1485, marihuana which is imported into the United States must be declared to customs officers. If it comes in by vehicle, a manifest is required under 19 U. S. C. A. 1459. In addition, the consignee of the merchandise must make an entry in writing and a declaration under oath.

19 U. S. C. A. 1484;

19 U. S. C. A. 1485.

Since possession of marihuana is a crime in most jurisdictions, including California, the consignee might argue that the mandatory documents would furnish a "link-in-the-chain" in a potential state prosecution. However, this Court recently held that 21 U. S. C. A. 176a does not violate the self-incrimination privilege.

Browning v. United States, 366 F. 2d 420, 422 (9th Cir. 1966).

Under 26 U. S. C. A. 4741 and 26 U. S. C. A. 4742, the transferee of marihuana is required to pay a special tax upon each transfer and to furnish a written order. One copy of the order form is preserved in the records of the internal revenue district. It also might be argued that these statutes tend to furnish a "lead" or

"link-in-the-chain" in regard to future state prosecutions. However, this Court held that 26 U. S. C. A. 4742(a) does not violate the self-incrimination privilege.

Browning, supra, at p. 422.

The Fifth Circuit held that 26 U. S. C. A. 4741 does not violate the self-incrimination privilege.

Haynes v. United States, 339 F. 2d 30, 31-32 (5th Cir. 1964), cert. denied, 380 U. S. 924 (1965).

It might be argued that these cases were decided upon the theory that the other crimes would be future crimes. However, this is not the case, because the other crimes have already been committed by the time that the documents are required.

Browning and Haynes were both decided after Murphy (June 15, 1964).

It also is noteworthy that Reyes, Palma and Eramdjian were decided long after the "link-in-the-chain" statement appeared in Blau v. United States, 340 U. S. 159, 161, in 1950, so this argument has already been held inapplicable to a Section 1407 registration by this Court in Reyes.

3. The Effect of Albertson.

In Albertson, supra, the Supreme Court applied the self-incrimination privilege to the statutory requirement of registration by Communist Party members in absence of registration by the

Party itself. However, unlike the Section 1407 registration, the registration in Albertson would have practically amounted to a confession of crime by every registrant under the provisions of 18 U. S. C. A. 2385 and 50 U. S. C. A. 841 and the conclusions reached in Communist Party of United States v. United States, 331 F. 2d 807, 812 (C. A. D. C. 1963), cert. denied, 377 U. S. 968 (1964), and the dissenting opinion of Justice Brennan (author of the Albertson opinion) in Communist Party v. Control Board, 367 U. S. 1, 198-99 (1961).

Furthermore, registration in Albertson involved self-incrimination in connection with potential Federal prosecution, while Section 1407 does not. Appellant cites 21 U. S. C. A. 174 and 21 U. S. C. A. 178 and suggests that a registration would be received in evidence under these statutes. If this would be objectionable, the objection should be made when the evidence is offered. This appears to be the reasoning applied to consideration of another statute's constitutionality in Stone, supra, decided after Albertson.

Appellant also states that registration would entail an admission of commission of the crime of failing to register upon leaving the United States under Section 1407. However, appellant has not shown that he falls within this classification.

> "A litigant can be heard to question the constitutionality of a statute only when and insofar as he at least claims to be damaged by its operation."
>
> Atherton v. United States, 176 F. 2d 835, 841 (9th Cir. 1949), cert. denied, 338 U. S. 938

(1950);

citing: Alabama State Federation of Labor, etc. v. McAdory, 325 U.S. 450 (1945).

A third distinguishing feature between Albertson and the instant case is the fact that no tribunal is available under Section 1407 to test a claim of the privilege, so the rule of United States v. Sullivan, 274 U.S. 259 (1927) is applicable. In Sullivan, the Supreme Court held that where one claims that an income tax return called for self-incriminatory answers, he should raise the objection in the return but could not refuse to make any return at all. Albertson emphasizes the desirability of having a tribunal act as "the final arbiter of the merits of the claim" of self-incrimination (at p. 79). A potential Section 1407 registrant may not silently raise and hear his own claim of self-incrimination and then rule in his own favor.

In United States v. Grosso, 358 F. 2d 154, 164 (3rd Cir. 1966), the appellant contended that the wagering tax return, required under 26 U.S.C.A. 4401, violated the privilege against self-incrimination because there was a "possibility of exposure to prosecution under local law" (at p. 164). The appellate court rejected the contention upon two grounds, including the following:

> "If, as the appellant now contends, the form of return would call for the disclosure of potentially incriminatory information, the objection should have been raised in the return." (at p. 164).

Appellant stands in the same position. Since Grosso (March 25, 1966) and Browning (September 8, 1966) were decided after Albertson (November 15, 1965), it is evident that Albertson and prior decisions (including Murphy) do not require the emasculation of Section 1407, which was described by the trial judge as "one of the most salutary statutes we have on the books today" [R. T. 6].

C. SECTION 1407 OF TITLE 18, UNITED STATES CODE, DOES NOT UNCONSTITUTIONALLY RESTRICT THE RIGHT TO TRAVEL.

The mere requirement of filling and surrendering a registration certificate does not constitute a violation of the right to travel.

> Reyes, supra, 258 F. 2d 774, 778, 782-83 (footnote).
>
> " 'The right to travel is not an absolute one, free of all restraint or regulation.' "
>
> Reyes, supra, at 783 (footnote).

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment in the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson
PHILLIP W. JOHNSON

No. 21561

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WYOMING FARM BUREAU MUTUAL INSURANCE COMPANY, a corporation,
Appellant,

-vs.-

CURTIS L. SMITH and JAMIE L. SMITH,
Appellees.

Appeal from the United States District Court for the District of Montana

BRIEF OF APPELLANT

Corette, Smith, Dean & Robischon
Professional Building
Butte, Montana 59701

Attorneys for Appellant, Wyoming Farm Bureau Mutual Insurance Company, a corporation

STANDARD PRINT.

SUBJECT INDEX

TABLE OF CASES AND STATUTES CITED

No. 21561

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WYOMING FARM BUREAU MUTUAL INSURANCE COMPANY, a corporation,

Appellant,

-vs.-

CURTIS L. SMITH and JAMIE L. SMITH,

Appellees.

Appeal from the United States District Court for the District of Montana

---

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This action was prosecuted in the United States District Court for the District of Montana, Missoula Division, under the provisions of *28 U.S.C., Section 1332.* The jurisdictional amount and diversity of citizenship were admitted to exist through allegations in plaintiff's Complaint, (Tr. p. 2) and, admissions in defendants' Answer. (Tr. p. 5)

The action was for declaratory judgment pursuant to the provisions of *28 U.S.C., Section 2201.*

This court has jurisdiction of this appeal pursuant to the provisions of *28 U.S.C., Section 1291,* and *28 U.S.C., Section 1294.* The appeal to this court was perfected in compliance with *Federal Rules of Civil Procedure, Rule 73, et seq.;* and the rules of the *United States Court of Appeals for the Ninth Circuit* (Tr. pp. 30, et seq.)

STATEMENT OF THE CASE

This appeal is taken from the decision of the Honorable Russell E. Smith, United States District Judge, set forth in the Opinion in Civil No. 1120, United States District Court for the District of Montana, Missoula Division, (Tr. pp. 22, et seq.) and the Judgment entered thereon on the 15th day of November, 1966. (Tr. p. 29)

This appeal raises no issue or controversy over any of the relevant and material facts.

Prior to the year 1964, the Appellant, who we shall hereafter refer to as Wyoming appointed Robert L. Everhard as its agent in Granite County, Montana. (Tr. pp. 22, 23) The agency relationship between Everhard and Wyoming was formed through Wyoming's "Standard Agent's Agreement." (Tr. pp. 18 through 21)

Some time prior to January 24, 1964, Curtis L. Smith (one of the Appellees) sought out Everhard and told him that he, Smith, was interested in fire insurance for his poultry house and contents. As a

result, Everhard went to see Smith at his home on the evening of January 24, 1964. During the course of the evening, Smith signed an application for insurance (Tr. pp. 16, 17) and delivered $66.00 to Everhard to cover the first annual premium. (Tr. p. 23)

The application, together with the premium, was mailed to Wyoming at its Home Office in Laramie, Wyoming. The Home Office promptly rejected the application and returned it, together with the premium to Everhard, who received it in Philipsburg, Montana, on *February 3, 1964*. (Tr. p. 23)

Everhard made efforts to reach the Smiths on that day but was unsuccessful. During the early morning hours of *February 4, 1964*, the poultry house and contents which were described in the application, burned. (Tr. p. 23)

Later in the day of February 4, 1964, Jamie L. Smith, the wife of Curtis L. Smith, advised Everhard of the fire. At that time Everhard advised Mrs. Smith of Wyoming's rejection of the application and delivered to her the letter of rejection, the rejected application, and the $66.00. Later the $66.00 was tendered back to Wyoming, which refused to accept it. (Tr. p. 23)

THE QUESTIONS PRESENTED

Inasmuch as Wyoming had promptly rejected the Smiths' application for insurance on January 31, 1964, and had returned the rejected application and first annual premium to Everhard prior to the fire loss of February 4, 1964, can Wyoming be bound to

provide coverage for the loss which is agreed to be in the amount of $17,934.00?

This question will turn upon the answer to the question as to whether or not Everhard on January 24, 1964, had authority to immediately bind Wyoming to a fire insurance contract with the Smiths.

The District Court held that Everhard had authority to *immediately bind* Wyoming on January 24, 1964, and, that through the exercise of this authority, Wyoming must provide coverage for the loss which the Smiths suffered on February 4, 1964.

SPECIFICATIONS OF ERROR

There were no findings of fact and conclusions of law, as such, in the trial of this case in the District Court. Insofar as the facts in this case are concerned, the Appellant believes that the lack of specific findings of fact is not material.

Because of the lack of conclusions of law, however, the Appellant must specify as error every material legal conclusion which the District Court *could* have made to support its ultimate decision. With this qualification in mind, the Appellant sets forth the following specification of errors:

1. The District Court erred in concluding that Everhard had *actual* authority to bind Wyoming to an insurance contract with the Smiths on January 24, 1964.

2. The District Court erred in concluding that Everhard had *implied* authority to bind Wyoming to an insurance contract with the Smiths on January 24, 1964.

3. The District Court erred in concluding that

Wyoming had vested Everhard with *ostensible* or *apparent* authority to bind Wyoming to an insurance contract with the Smiths on January 24, 1964.

4. The District Court erred in concluding that Wyoming, through Everhard or otherwise, had *waived* the express condition of the application for insurance which provided that the insurance applied for by Curtis Smith would not be effective until approved by Wyoing at its offices in Laramie, Wyoming.

5. The District Court erred in concluding that there was an estoppel to deny coverage as a result of the acts or omissions of either Wyoming or Everhard.

6. The District Court erred in concluding that Wyoming's agent, Everhard, accepted Smith's application for insurance on January 24, 1964 to be effective on January 25, 1964.

7. The District Court erred in concluding that the Smiths were entitled to judgment on their counter-claim against Wyoming.

8. The District Court erred in entering judgment in favor of the Smiths and against Wyoming.

SUMMARY OF ARGUMENT

The argument to follow can be summarized with the following statements of the Appellant's contentions:

1. In order to hold Wyoming bound to the Appellees the District Court had to find that Wyoming's agent, Everhard, had authority to bind the company on the date that the application for insurance was taken.

2. It appears to be uncontroverted that Everhard did not have actual or implied authority to bind the company under the "Standard Agent's" agreement between Wyoming and Everhard.

3. *Wyoming* did not intentionally or by want of ordinary care cause or allow the *Appellees* to believe that Everhard had authority as an agent to bind the company upon the date that the application for insurance was taken and therefore Everhard did not act under ostensible or apparent authority to bind the company.

4. The application for insurance plainly stated that the insurance applied for would not become effective unless and until the application was approved by Wyoming at its office in Laramie, Wyoming.

5. The statement concerning the acceptance of the application by Wyoming was acknowledged by the signature of one of the Appellees, thus negating any contention that Wyoming had clothed Everhard with ostensible or apparent authority.

6. The statement concerning the acceptance of the application by Wyoming was a condition precedent to the creation of any contract for insurance between Wyoming and Appellees.

7. Everhard had no authority to waive the terms of the application pertaining to acceptance by Wyoming.

8. The fact that Everhard had authority to complete the policy term portion of the application did not constitute actual or ostensible authority for Everhard to fix the effective date of an insurance contract.

9. The existing precedent from the State of Montana supports the position of Wyoming in this case.

10. The District Court failed to consider or apply the existing precedent in Montana to this case.

11. The legal authorities set forth in the District Court's opinion and decision are distinguishable and inapplicable to the legal issues raised in this case.

ARGUMENT

Wyoming, upon receipt of the application, acted to reject the application; and, *four days before the fire loss transmitted the rejection to its agent.* The agent, Everhard, attempted to notify the Smiths of the rejection by Wyoming the day before the fire. (Tr. p. 23)

In view of these facts, the only basis upon which Wyoming can now be bound would be on the acts of its agent, Everhard, prior to the rejection of the application by Wyoming. Specifically, we are concerned in this appeal with the nature and effect of the transactions between Everhard and Curtis Smith on January 24, 1964.

The ultimate issue to be resolved falls in the law of Agency. Did Everhard, as Wyoming's agent, *have the authority* on January 24, 1964 to bind Wyoming to an immediate contract for insurance with the Smiths?

I. EVERHARD DID NOT HAVE *ACTUAL* AUTHORITY TO BIND WYOMING TO AN IMMEDIATE CONTRACT FOR INSURANCE ON JANUARY 24, 1964.

R.C.M. 1947, Section 2-123, provides:

> "Actual authority is such as the principal intentionally confers upon the agent, or intentionally, or by want of ordinary care allows the agent to believe himself to possess."

Everhard's "actual authority" is contained in the "Standard Agent's Agreement." (Tr. pp. 18-21) Section 4 of the Agreement provided:

> "The Agent shall not make *** any contract of insurance * * *. The agent shall not incur any indebtedness or liability on behalf of the Company in any manner whatsoever."

Everhard's agency relationship to Wyoming is defined in Section 1 of the "Standard Agent's Agreement."

> "1. Company hereby appoints Robert L. Everhard as a General Agent of the Company for the purpose of soliciting applications for insurance and remitting initial premium within the territory designated herein and for servicing existing policies as may be required."

It is clear from this language in the Agreement that Everhard did not have *actual authority* to bind Wyoming to a contract for insurance with the Smiths on January 24, 1964. Nor can it be reasonably argued, in view of the language set forth above, that Everhard could have believed himself to possess such actual authority.

II. EVERHARD DID NOT HAVE *OSTENSIBLE* OR *APPARENT* AUTHORITY TO BIND WYOMING TO AN IMMEDIATE CONTRACT FOR INSURANCE ON JANUARY 24, 1964.

In Montana, an agent has such authority as the

principal actually or *ostensibly* confers upon him. *R.C.M. 1947, Section 2-122.*

Since it is clear, and the District Court may have so held, that Everhard did not have *actual* authority to bind Wyoming, then the only authority which Everhard could have conceivably possessed, which was sufficient to bind Wyoming, would have been *ostensible* authority.

Although this point is not completely clear from the District Court's opinion, it may be that the District Court based its ultimate decision upon a conclusion that Everhard was acting under *ostensible* authority. It is clear from the Montana law that the District Court had to find either (1) that Everhard had *actual* authority to bind Wyoming, or (2) that he was acting under *ostensible* authority to bind Wyoming. There are no other alternatives.

R.C.M. 1947, Section 2-124 defines ostensible authority as follows:

> "Ostensible authority defined. Ostensible authority is such as *a principal,* intentionally or by want of ordinary care, causes or allows *a third person* to believe the agent to possess." (Emphasis supplied)

The application for insurance (Tr. p. 17) contains the following:

> "It is understood and agreed that the insurance herein applied for shall not be effective unless and until approved by the Company at its office in Laramie, Wyoming."
>
> "Dated this 25th day of January, 1964."
>
> "CURTIS SMITH"

The language in the application quoted above, which was acknowledged by Curtis Smith by his signature, militates directly and unequivocally against any possible contention that Wyoming, "intentionally or by want of ordinary care," led Curtis Smith to believe that Everhard had authority to bind the company.

The District Court, in its opinion, seems to be saying that when Wyoming permitted Everhard to complete the policy term information on the application, which is described at page 24 of the Transcript, it created ostensible authority in Everhard to immediately bind the company.

This theory completely ignores the plain language of the statement in the application to the effect that the insurance applied for ". . . shall not be effective unless and until approved by the Company at its office in Laramie, Wyoming."

It is well established in Montana that *the language in the application reserving the right to accept was sufficient notice to the Smiths* that Everhard's authority was limited insofar as binding Wyoming to a contract for fire insurance on the spot. *R.C.M. 1947, Section 2-125; Weidenaar v. New York Life Insurance Co.*, 36 Mont. 592, 94 Pac. 1.

III. THE FACT THAT EVERHARD HAD AUTHORITY TO COMPLETE THE POLICY TERM PORTION OF THE APPLICATION DOES NOT CONSTITUTE A WAIVER OF ANY OTHER PROVISIONS OF THE APPLICATION.

The District Court, in its opinion, does more than

merely ignore the language of the application pertaining to the right of Wyoming to accept before the insurance applied for becomes effective.

The District Court has placed great and controlling significance upon Everhard's authority to complete the policy term portion of the application. The District Court suggests in its opinion that Everhard's authority to complete this portion of the application constitutes either (1) a waiver, or (2) actual authority to bind the company. The District Court is very concerned, in its opinion, with a retroactive commencement date. (Tr. pp. 24, 25)

In viewing the purpose of the policy term portion of the application, the Court concerns itself with a purely hypothetical situation which has no application to the undisputed facts in this case.

The Court agrees that the company has a right to select the risks which it would underwrite, and then, as a practical matter places this right completely out of the reach of the company.

There is nothing novel or unfair in the issuance of insurance policies which have been dated retroactively from the date of the company's acceptance of the application. Directly in point *on the effect of Everhard's completion of the policy term portion* of the application in this case is the case of *Mofrad v. New York Life Ins. Co.*, (CCA 10th, Utah) 206 F2d 491 (1953)

In the *Mofrad Case* the 10th Circuit Court of Appeals was confronted with the same contention as is

advanced by the District Court in this case in support of its decision.

> "But appellants argue that unless the insurance began on the date of the application, as specified in Part 3, *the premium would cover a period during which the company did not assume the risk*, and the insured would be paying for insurance for a period when he was not insured.
>
> "The application for the policy provided that the insurance policy should be dated as of the date of the application. 'It was within the rights of, and was competent for, the parties to provide in the application under what conditions and at what time the policy should become effective and binding.' Jones v. New York Life Ins. Co., 1927, 69 Utah 172, 253 P. 200, 202. *The provisions in the application agreement do not fix the effective date of the insurance contract.* They simply impose conditions precedent to the taking effect of the insurance contract. *Shira v. New York Life Ins. Co., 10 Cir. 1937, 90 F2d 953.* *When read together they mean that the insurance coverage shall take effect only in the event the conditions precedent specified in the application are fulfilled, and then only as of the date of the application. Shira v. New York Life Ins. Co.,* supra." (Emphasis supplied.)

In the instant case, the District Court held directly contrary to what was held by the Court in the *Mofrad Case.* The District Court selected the policy term portion of Wyoming's application and Everhard's acts in completing this portion of the application as the single basis for fixing the effective date of the fire insurance contract which it found was in existence in this case.

IV. THE OPINION AND DECISION OF THE DISTRICT COURT IS NOT SUPPORTED BY THE EXISTING LAW OF THE STATE OF MONTANA AND IS A DEPARTURE FROM ESTABLISHED PRECEDENT IN THAT STATE.

The District Court, in its opinion and decision, refuses to accept and follow an established precedent in Montana on the point in issue.

In the case of *Kennedy v. Mutual Benefit Life Ins. Co. of Newark, N.J.*, 205 Fed. 677 (1913) essentially the same question was before the District Court for the State of Montana. The facts in the *Kennedy Case* are almost identical to the facts in the instant case.

Kennedy made application for life insurance with Mutual through its local agent. The first annual premium was paid by Kennedy and in return therefor he received from the agent a receipt which recited:

> "This receipt will be binding on the company from the date of medical examination, *provided the application for insurance is approved and policy issued by the company as applied for.*" (Emphasis supplied.)

The application was disapproved by the company's medical board, and ultimately, on January 22, 1906, a letter was written by the company to its Butte agent stating that additional medical information was required.

Kennedy was accidentally killed on January 26, 1906, the day *before* the company's agent in Butte received the company's letter of January 22, 1906. Demand was made by Kennedy's beneficiary for the

proceeds of the policy applied for and refused by the company.

The Honorable George W. Bourquin, District Judge for Montana, in holding for the defendant insurance company said:

> "The contract of insurance sought was not consummated. *Kennedy's application must be read with the receipt* to discover the conditions upon which a contract for insurance would arise. Thus read, the application was an offer by the applicant for a contract of insurance, unilateral in its nature, by defendant, and to be accepted by defendant by (1) approval of the application, and (2) by issuance of a policy as applied for. Acceptance required both.
>
> "*Until so accepted, neither party was bound,* and *both parties had a right to a locus poenitentiae.* The contract would be created by defendant's performance of the conditions stipulated in the receipt, and not by any defendant's counter promise — by things done and not by words said."
>
> * * * *
>
> "The case may be likened to those wherein the application provides that insurance shall not be in force until delivery of the policy. Therein delivery, actual or constructive, is a condition precedent to the creation of a contract, even as issuance of the policy was in the instant case." (Emphasis supplied)

To the same result and effect is the case of *Weidenaar v. New York Life Ins. Co.*, 36 Mont. 592, 94 Pac. 1. The *Weidenaar Case* presents fundamentally the same question as was later presented in the *Kennedy Case,* although the Montana Supreme Court treats Weidenaar from the law of agency approach rather than the law of contracts. In the *Weidenaar*

Case the Montana Supreme Court stated at page *615 of 36 Montana:*

> ". . . I think, in this case, *consideration should be given to all parts of the transaction* in determining whether plaintiff (applicant) exercised reasonable care. These recitals in the application were, to some extent, at least, binding upon the plaintiff under the circumstances disclosed by this record. He cannot be heard to say that he relied upon so much of the application blank as disclosed the fact that it pertained to the business of the defendant, *but that he repudiates those provisions whereof beneficial to the company.*"
>
> * * * *
>
> "It seems to me that some courts, of the very highest respectability and learning, have taken judicial notice of matters which they were not by law authorized to judicially know, *and have gone so far in holding insurance companies liable as to result in the application of different rules of contract law to them than would have been applied to individuals under the same circumstances.* I cannot agree that this may rightly be done. While I have no doubt that many life insurance solicitors resort to reprehensible means to obtain business, and sometimes commit crime as was done in this case, *I think the law should be applied, without prejudice, to all alike, and I feel certain that the same law that affords protection to a person dealing with an individual will, if properly construed and applied, afford equal protection to one dealing with a life insurance company.*" (Emphasis supplied)

It is noteworthy that the District Court in the instant case cites no Montana precedent for its decision.

V. THE LEGAL AUTHORITIES SET FORTH IN THE DISTRICT COURT'S OPINION AND DECISION ARE INAPPLICABLE TO THE LEGAL ISSUES RAISED IN THIS CASE.

It is respectfully submitted that, in view of the opinion written by the District Court (Tr. p. 22 et seq) the Appellant, in this brief should comment upon the legal authority which the District Court presumably relied upon to reach its ultimate result.

Mayfield v. Montana Life Insurance Company
62 Mont. 535, 205 Pac 669 (1922)

In its opinion, the District Court seems to rely to some extent upon the decision of the Montana Supreme Court in the *Mayfield Case.*

It is submitted that no part of the Montana Supreme Court's ruling in that case is applicable to the instant case. *Mayfield* considers the acts of a *general* agent. At *page 541* of the opinion reported in *62 Montana*, the Court quotes with approval a statement from *3 Cooley's Briefs on the Law of Insurance*, page 2478.

> "' The extent of an agent's power to waive conditions and forfeitures is, of course, dependent on the extent of his authority to act for the insurer. If he is a *general agent, his power to waive conditions* and forfeitures is according to the weight of authority, co-extensive with that of the insurance company itself.'" (Emphasis supplied)

In *Mayfield* the court found that Gutch "was a general agent of the insurance company" and that he "was clothed, prima facie, with the ostensible authority to, *and did waive the conditions* of the receipt"

which concerned acceptance of the application by the insurance company.

This Court has found that as between Everhard and the insurance company there was not a "general agency" relationship insofar as that term applies to the authority or power of an insurance agent. (Tr. p. 23) The undisputed evidence revealed that Everhard *believed he did not* have authority to bind the company, regardless of what his representations might have lead the Smiths to believe. Therefore, there is no question of implied authority in this case.

In view of this situation the key circumstance, general agency, which supports the decision in *Mayfield* is absent in this case.

Additionally, in the *Mayfield Case* the Supreme Court considered important to its decision the fact that the general agent "made it a *general practice to represent* to prospective patrons that the insurance taken out through him would be binding on the company from the date of the payment of the first year's premium and the passing of a satisfactory medical examination, and that the company had enjoyed a considerable amount of profitable business through the activities of this agent."

The mere mention of these circumstances by the Supreme Court indicates that such circumstances were significant to the Court's decision. There were no such circumstances present in the instant case. In fact, the undisputed evidence of the custom or practice of Everhard in this regard, is to the contrary.

R.C.M. 1947, Sections 13-715 and 13-717

In its opinion the District Court seems to rely to some extent upon the provisions of *R.C.M. 1947, Sections 13-715 and 13-717.* The plaintiff respectfully questions the applicability of either of these statutes to the instant case. These statutes are concerned with the interpretation or construction of a contract *that was otherwise legally entered into.* These statutes are not applicable to that phase of a contractual relationship which inquires into *the authority* of a party to enter into a contract. The question in *this case* is antecedent to any matter with which Sections *13-715* and *13-717* might be involved.

For the same reason the statement quoted by the District Court from *Williston on Contracts, Vol. 1, Sec. 98 (rev. ed. 1936) p. 314* is obviously inapplicable. Inherent in the statement from *Williston* is the fact that both parties possessed the *authority* to contract. Everhard's lack of authority to enter into a contract is the primary if not single issue in this case.

CONCLUSION

The part-time soliciting agent of a small fire insurance company obtained an application for fire insurance from the Appellees. The application and the first annual premium were forwarded to the company. Upon receipt of the application the fire insurance company immediately rejected the application and returned it together with the premium to the soliciting agent.

The agent attempted to inform the applicants that the company had rejected the application, but was unable to do so. On the date following the receipt

of the returned application and premium by the agent, the property which was the subject of the application was destroyed by hostile fire.

The District Court held that the contract for fire insurance was in effect as of the date of the taking of the application, *despite the fact that the company had formally and completely rejected the application between the date of the application and the date of the fire!*

Would the District Court's decision have been different had Everhard been able to contact the Smiths with the information prior to the fire loss? If so, why? Or, to logically extend the District Court's theory of the case, was Wyoming compelled to give the Smiths the customary 30-day notice (included in most insurance contracts) of its termination of coverage? If not, why not?

A decision, sound on the law, does not leave these remaining perplexities. The opinion of the District Court contains incongruous statements of law that are out of harmony with the past and provide no guide for the future.

It is respectfully submitted that the judgment of the District Court should be reversed and the matter remanded to the District Court with directions that judgment be entered for the Appellant.

Respectfully Submitted,

CORETTE, SMITH,
DEAN & ROBISCHON

By JAMES A. ROBISCHON
Attorneys for Appellant,
Wyoming Farm Bureau Mutual
Insurance Company, a corporation

CERTIFICATE

I CERTIFY that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing Brief is in full compliance with those rules.

CORETTE, SMITH,
DEAN & ROBISCHON

By James A. Robischon
Attorneys for Appellant,
Wyoming Farm Bureau Mutual
Insurance Company, a corporation

No. 21561

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WYOMING FARM BUREAU MUTUAL INSURANCE COMPANY, a corporation,
Appellant,

-vs.-

CURTIS L. SMITH and JAMIE L. SMITH,
Appellees.

Appeal from the United States District Court for the District of Montana

BRIEF OF APPELLEES

KNIGHT & DAHOOD
205 Main Street
Anaconda, Montana 59701

Attorneys for Appellees, Curtis L. Smith and Jamie L. Smith.

SUBJECT INDEX

TABLE OF CASES AND STATUTES CITED

SUBJECT INDEX (Continued)

No. 21561

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WYOMING FARM BUREAU MUTUAL INSURANCE COMPANY, a corporation,
Appellant,

-vs.-

CURTIS L. SMITH and JAMIE L. SMITH,
Appellees.

Appeal from the United States District Court for the District of Montana

---

BRIEF OF APPELLEES

The precise and closely reasoned opinion of District Judge Russell E. Smith is, in our opinion, a sufficient reply to the Appellant's Brief. All of the Appellant's arguments in its Brief on appeal were presented to the District Judge and fully argued. Nevertheless, to be certain that we have fulfilled to the best of our ability our full obligation to our client, we do submit this Brief as a "point by point" reply to the Appellant's Brief and only to supplement the opinion of the District Judge.

STATEMENT OF JURISDICTION

The statement of jurisdiction found in the Appellant's Brief is incorporated herein.

STATEMENT OF THE CASE

The Appellant's statement of the case is insufficient. Under Rule 18(e) 3 of the Rules of the United States Court of Appeals for the Ninth Circuit, the following statement of facts is respectfully submitted.

Wyoming Farm Bureau Mutual Insurance Company, hereafter referred to as Wyoming, is owned and operated by the Wyoming Farm Bureau and the Montana Farm Bureau. Both Corporations. Any person wishing to purchase insurance protection from Wyoming must be a member of either the Wyoming Farm Bureau or the Montana Farm Bureau. Upon becoming a member of the Farm Bureau and paying the membership fee, the Appellees herein, Curtis L. and Jamie L. Smith, husband and wife, were eligible to purchase insurance coverage through Robert L. Everhard, the General Agent and the exclusive agent for Wyoming in the County of Granite, State of Montana. (TR. P. 22, 23).

On the evening of January 24, 1964, Mr. Everhard went to the home of the Appellees for the purpose of selling Mr. and Mrs. Smith some fire insurance protection on their poultry house. The amount of coverage was decided upon and Mr. Everhard indicated to the Appellees that their property would have insurance protection as of January 25, 1964. Whereupon

Mr. Smith signed the papers offered by Mr. Everhard and paid to Mr. Everhard the full premium of SIXTY-SIX DOLLARS ($66.00). (TR. P. 23).

Wyoming had furnished Everhard with application forms and with the exception of the signature of Smith, the form was completed in the handwriting of Everhard. The form contained the names of the parties, a description of the property, the fire insurance rate, the amount of insurance coverage on the property that was insured and the amount of the total fire premium. (TR. P. 16 and 17).

It also contained in the upper right hand corner of the front page a printed box which allowed the policy term to be inserted. (TR. P. 16).

This box on the completed application showed the policy term to be for 365 days — From: Jan. 25, 1964 To: Jan. 25, 1965. (TR. P. 16).

It also contained on the reverse side the following:

> "It is understood and agreed that the insurance herein applied for shall not be effective unless and until approved by the Company at its office in Laramie, Wyoming."

There was no language in the application, as there is in some, that the agent had no power to alter any of the terms of the application. (TR. P. 16, 17 & 26).

A fire destroyed the poultry house and when the loss was reported to Everhard, he advised the Smiths that Wyoming had rejected their application. (TR. P. 23)

ARGUMENT AS TO THE RECORD

Appellant in its Brief points out that the question with which we are concerned in this Appeal is the nature and effect of the transaction between Everhard and the Smiths on January 24, 1964. (App. Br. P. 7)

The Trial Court pointed this out in its opinion. (TR. P. 24, Para. 1). The opinion then proceeds to outline its findings *based on the evidence adduced at the trial and the law applicable thereto.*

The Appellant in his Brief (P. 4) maintains that there were no findings of fact and conclusions of law, as such. But, the Trial Court has indicated that its opinion constitutes the Court's findings of fact and conclusions of law. (TR. P. 22)

The Appellant then alludes to the immateriality of the lack of specific findings of fact (APP. BR. P. 4) and then summarizes an argument which is *based on facts that do not appear in this record.*

In its argument, Appellant comments on what the evidence *undisputedly* revealed about agent Everhard's state of mind. (TR. P. 8, 17) and his custom or practice (TR. P. 17). Nowhere in the transcript or record of this case does any of this evidence appear.

Appellate rules do not require the transcript, or even a part of it, to be a part of the record on appeal, but it is the contention of the Appellee that the Court on appeal can only decide questions which can be determined from what record there is before it, and that all others must be presumed waived. SPRINGER V. BEST C.A. 10th (1959) 264 F 2d 24.

Certainly it is the duty of the Appellant to preserve in the record all matters which may bear upon the errors assigned by the Appellant. PERESIPKA V. ELGIN, J. & E. RR. CO. CA IND. (1954) 217 F 2d 182.

And where that record does not include any of the evidence adduced at trial, the findings of the trial court cannot be controverted on appeal. WHITELEY V. FORMOST DAIRIES CCA ARK. (1958), 254 F 2d 36.

Appellee respectively contends that the District Court's findings are presumptively correct, and in the absence of a proper record, (shown to contain all of the evidence essential to enable the Circuit Court to determine the correctness or incorrectness of the challenged findings) must not and cannot be questioned on review. SUBLETTE V. SERVEL, INC. CCA ARK. (1942) 124 F 2d 516.

In the case of WATSON V. BUTTON, CA ORE. (1956), 235 F 2d 235, the Court said:

> "An Appellant must include in the record to C.C.A. all of the evidence upon which the District Court might have based its findings, which are claimed to be erroneous, and if this is not done, the Judgment must be affirmed."

It is respectfully contended that the Appellant has not submitted such a record in this case and that the findings of the District Court should be affirmed.

QUESTION PRESENTED

What was the legal effect of what took place in the Smith home on the night of January 24, 1964? (TR. P. 24).

The question of the dispute as to what was said about when coverage would go into effect was submitted to the Jury by way of special interrogatories and it was decided by the Jury that the agent, Mr. Everhard, *told the Smiths that their property would be insured on January 25, 1964.* (TR. P. 25)

ARGUMENT

Wyoming, through agent Everhard, sold fire insurance coverage to the Smiths, told them they were covered as of January 25, 1964 (TR. P. 25) and accepted the first annual premium (TR. P. 13). Everhard did not notify the Smiths of the declination of coverage until after the fire loss occurred. (TR. P. 14).

AS TO SPECIFICATION OF ERROR NO. 1

Appellant refers to RCM 1947 Section 2-123 and contends that Everhard's actual authority is governed by the Standard Agent's Agreement (TR. P. 18-21). We agree that this may be true as between Everhard and Wyoming but not as to the Smiths. There is nothing in this transcript which shows that the Smiths even knew of the existence of the contract. (TR. P. 26).

And as the Trial Court pointed out (TR. P. 26) "a principal is in no position to urge that general and undisclosed limitations of the agent's power prevent that contract from arising."

Apparent authority is equal to real authority when the agent's limitations are unknown to the applicant; moreover, the forms furnished an insurance agent are

evidence of his authority and are representations to the public concerning his authority. PACIFIC MUTUAL LIFE INS. CO. OF CALIF. V. BARTON, 50 F 2d 362, CCA FLA. (1931).

The general rule applicable is stated in PAGNI V. NEW YORK LIFE INS. CO. 23 P 2d 6 WASH. (1933):

> "An Insurance Company is bound by all acts, contracts, or representations of its agent, whether general or special, which are within the scope of his real or apparent authority, notwithstanding they are in violation of private instructions or limitations upon his authority, of which the person dealing with him acting in good faith, has neither actual nor constructive knowledge."

As the Court pointed out in its opinion (TR. P. 26) Everhard had actual authority to do what he in fact did, i.e., to take the application and to show the policy term on that application.

As to the Appellant's argument that Everhard could not have believed himself to possess such actual authority, there is nothing in the record to support this contention. But, *there is evidence in the record that he told the Smiths that they were covered as of January 25, 1964.* We again submit that the fact findings in this case have been made by the Trial Court and in the absence of a proper record cannot be the basis for any argument by Appellant.

AS TO SPECIFICATION OF ERROR NO. 2

This specification of error as to the Trial Court concluding that Everhard had *implied authority* to bind Wyoming (App. Br. P. 4) is not supported by any

argument in the Brief and therefore must be deemed as waived. ASHLEY V. SAFEWAY STORES, INC. 100 MONT. 312, 322, 47 P 2d 53 (1935).

This Trial Court held that where an agent is authorized to use a form in the solicitation of business and is authorized to complete the form in a particular way, he has as a matter of law an *implied authority to explain the meaning of the writing.* (TR. P. 26).

AS TO SPECIFICATION OF ERROR NO. 3

This specification of error is concerned with ostensible or apparent authority and cites the case of WEIDENAAR V. NEW YORK LIFE INSURANCE CO. 36 MONT. 592, 94 Pac. 1., (1908) as supporting the contention that the language in the application was sufficient notice to the Smiths that Everhard's authority was limited insofar as binding Wyoming to a contract for fire insurance.

A review of the case will reveal that Weidenaar can readily be distinguished. It is an action for money paid on a promissory note decided in 1908. It was a 2 to 1 decision and had a bizarre set of facts:

> "An applicant for insurance, unable to read or write English, signed a note for the premium on an insurance policy. Without knowledge of his rejection in that company, he signed another note by which that note was taken up, on representation made by the agent of the company, who falsely introduced another person as agent of the New York Life Insurance Company, that he could get a better policy in that company. The agent of the first company procured an application from the agency director of the New York Life, who had power to hire agents, with the con-

sent of the company, on a brokerage basis, which the company had knowledge its agents used at times, and the applicant signed such application in the presence of his daughter, two sons, and another person, without question. The policy, with the medical examination, was then returned by the agent to the agency director, who, in his own name, witnessed the signature, and sent in the policy and accepted $5, which the agent falsely claimed had been paid him. No receipt for advance premiums, as provided by the policy, had been signed or detached. Held, that under Montana statutes determining authority of agents, and defining actual and implied authority, the facts did not show that the agent of the first company was hired by the director of New York Life as agent, and that the maker of the note, on its negotiation and coming into the hands of a third person, could not hold the New York Life for the amount thereof, as the maker was charged with constructive notice of the lack of power of the agent."

The plaintiff was found guilty of gross negligence in signing the note as he did. *There was, in fact, no agency and no ratification.* A strong dissent was entered by one of the three Justices that heard the case. As pointed out in Appellant's Brief (p. 15) a crime was in fact committed. Therefore, we submit that the Weidenaar Case decision is not applicable to this case.

AS TO SPECIFICATION OF ERROR NO. 4

The Trial Court in its opinion (TR. pp. 24, 25) concluded that the evidence was *undisputed* that it was the practice of the company to accept applications on this form and then to retroactively date the policy according to the effective date of the term shown in the application. In fact, the Smiths purchased an automobile liability policy a few days after the 24th

day of January and when delivered, the policy effective date was the same as that shown on the application. (TR. p. 25).

As authority for rejecting the Court's finding that the policy term as written in the application determines the effective date of coverage, Appellant cites the case of MOFRAD V. NEW YORK LIFE INS. CO. (CCA 10th UTAH) 206 F 2d 491 (1953). (App. Br. P. 11) A reading of the Mofrad case immediately points out a distinguishing feature. In that case there was no evidence that the applicant was told *that coverage would be effective immediately.* This point was brought out in the case of GETTINS V. U. S. LIFE INS. CO., 6th Circuit, 221 F 2d 782, (1955) when the Mofrad case was cited along with another case and was distinguished in this language:

> "In each of those two cases the Courts pointed out the absence of evidence to show that the applicant was misled into believing that the policy would be effective prior to medical examinations. By contrast, *it is the existence of such evidence* upon which Appellants rely in the present case." (emphasis ours)

The evidence in the Mofrad case clearly showed that the applicant was aware that he must comply with certain requirements. Whereas, in this case, the evidence is clear that Everhard told the Smiths that coverage commenced on the 25th of January. (TR. P. 25).

In the Appellant's Brief, in addition to the Mofrad case, are cited the cases of JONES V. NEW YORK LIFE INS. CO., (1927) 69 UTAH 172, 253 P. 200 and SHIRA V. NEW YORK LIFE INS. CO., 10 CIR (1937), 90 F 2d 953. These cases hold that it is with-

in the rights of, and competent for, the parties to provide in the application under what conditions and at what time the policy should become effective and binding. In the Shira case the insured signed a separate written instrument in which he acknowledged that the policy was to take effect as of a certain date. The Courts in these cases are simply saying that it is competent for parties to agree upon a policy date. The Appellee agrees with this position. In this case the Smiths and Wyoming, through Everhard, agreed that the policy term would commence on January 25, 1964. (TR. P. 25).

Appellant contends that there is nothing novel or unfair in the issuance of insurance policies which have been dated retroactively from the date of the companies acceptance of the application (App. Br. P. 11) and again cites the Mofrad Case. *The learned Trial Court thought it unfair.* (TR. P. 25). Other Courts have dealt with this topic. In the case of RANSON V. THE PENN MUTUAL LIFE INS. CO. 274 P 2d 633 (CALIF. 1954) the court declared that this would not be dealing honestly with the insured and cited as authority the cases of ALBERS V. SECURITY MUTUAL LIFE INS. CO., 170 NW 159 (S.D.) (1918) and REYNOLDS V. N. W. MUTUAL, 176 N.W. 207 (IOWA). If there is nothing novel or unfair about accepting money as payment of a premium for that period during which there is no coverage afforded, then the insurance company guilty of this practice has disproved the theory that no one ever gets something for nothing.

The Appellant, on P. 12 of its Brief, contends that the Trial Court selected the policy term portion of Wyoming's application and Everhard's acts in completing this portion of the application as the single basis for fixing the effective date of the fire insurance contract which it found was in existence in this case. Query — in the absence of the issuance of the formal written policy, what else is necessary? Everhard was the agent for Wyoming and when the Smiths asked for fire coverage, he told them they would have coverage as of January 25, 1964 and wrote this date in the appropriate box in the application. Based on all of the evidence before it, not just this single basis, the Trial Court found that a contract of insurance did result. (TR. P. 27). In its transcript on appeal the Appellant could have included all the evidence that was available to the Trial Court. It chose not to do so. How can Appellant justify this action and yet seriously contest the findings of the Trial Court.

Next, Appellant challenges the Court's failure to follow case law which Appellant contends is applicable. The case of KENNEDY V. MUTUAL BENEFIT LIFE INS. CO. of Newark, N.J., 205 F 677 (1913) is cited as being *almost* identical on the facts. There is nothing in the Kennedy case, as there is nothing in the Mofrad case, and the Jones case, and the Shira case, supra, about the applicant being misled into believing that the policy would be effective prior to the medical examinations. This is clearly pointed out in the Gettins case supra.

In the Kennedy case, a microscopical examination

was required and never obtained. There was no question of agency, waiver or estoppel or oral or temporary contracts of insurance. This, then, is not legal precedent.

A review of Sheppard's Montana Citations will show that the Weidenaar case has been followed, as to the point relied upon by the Appellant, *not one single time.* There have been only five cases wherein the Weidenaar case was referred to and in each instance it was in connection with the legal point of ratification.

The Montana Supreme Court in BAKER V. UNION ASSUR. SOC. OF LONDON LTD., 81 MONT. 281, 297, 264 Pac. 132 (1928) adopted language which illuminates the inherent reaction of Judges and Juries in these cases and the motivation which has shaped and written the legal guideline:

> "The insured deals with no one but the agent; the company cannot deal with its patrons in any other way. Justice and law, therefore, require that the company shall be held to sanction what the agent agrees to, and upon which the insured relies. To allow the company to enforce a condition or forfeiture of the policy for a neglect to do that which the agent informs the insured shall not avoid the policy, would work the greatest injustice."

Appellant then attempts to distinguish the case of MAYFIELD V. MONTANA LIFE INS. CO., 62 MONT. 535, 205 P. 669 (1922) from our instant case. At P. 17 of its Brief the Appellant maintains that the undisputed evidence revealed that Everhard believed he did not have authority to bind the com-

pany, regardless of what his representations might have led the Smiths to believe. Again, *nowhere in the record is there any evidence of this state of mind of Everhard* and therefore this argument must fail. The same reasoning applies to the statement (P. 17 App. Br.) . . . "the undisputed evidence of the custom or practice of Everhard in this regard, is to the contrary." The Mayfield case and this case have these facts in common:

1. The premium for the first years coverage was paid to the agent.
2. The agent represented to the applicant that coverage was to go into effect at once.
3. In both cases this representation was made in the face of a printed paragraph which stated that the insurance would not take effect until approval by the home office.

The Court in the Mayfield case held:

> "Under these allegations the general agent, Gutch, was clothed, prima facie, with the ostensible authority to, and did, *waive the conditions of the receipt* issued to Mayfield, and that his agreement that the insurance should be in force from the date of its issuance was binding upon the company. . ." (Emphasis ours)

The Trial Court in this case has held:

> "The standard agent's agreement, whatever its effect as between the company and the agent, is not conclusive as to third parties. Everhard did have authority to take the application, and he did have authority to show the policy term on the application exactly as he did show it." (TR. P. 26)
>
> * * * * *
>
> "And if the words used by Everhard are to be interpreted in the sense that the Smiths under-

> stood them as Montana Law requires, then a contract of insurance did result and the Plaintiff is liable." (TR. P. 27)

The Court, in its opinion, (TR. P. 27) in comparing the Mayfield case to the case before it said:

> "Whether Everhard was a general agent or not, the authority given as to the term of insurance matter was sufficient to empower him *to waive the clause*, at least to the extent indicated in the opinion." (TR. P. 27 Note 6) (Emphasis ours)

The Appellees respectfully contend that the Trial Court followed the existing law of the State of Montana and cited Montana cases where it deemed it necessary to do so.

AS TO SPECIFICATION OF ERROR NO. 5

NEXT THE APPELLANT CONTENDS THAT THE LEGAL AUTHORITIES SET FORTH IN THE DISTRICT COURTS OPINION AND DECISION ARE NOT APPLICABLE.

Appellee has already discussed the applicability of the Mayfield case supra, and will not repeat that argument here.

Next, the Appellant claims that RCM 1947, Sections 13-715 and 13-717 are not properly in question, because these sections are concerned with a contract *that was otherwise legally entered into.* It seems clear to the Appellee that the *Trial Court found that a contract had, in fact, been legally entered into* and was citing these sections as authority for the position that all of the essential elements of a valid and binding contract were found in what took place between the parties on January 24, 1964.

The Court held that there was a *temporary contract* of *insurance* (TR. P. 28) made on that night. RCM 1947 Section 40-3726, provides for such contracts of insurance in these words:

> "1. Binders or other contracts for temporary insurance may be made orally or in writing, and shall be deemed to include all the usual terms of the policy as to which the binder was given. . ."

The leading case in Montana which recognizes and approves an oral or temporary contract of insurance is AUSTIN V. NEW BRUNSWICK FIRE INS. CO., 111 MONT. 192, 108 P 2d 1036 (1940). In that case the court held:

> "If the minds of the parties have met on the essential parts of the contract, it makes no difference whether the form of the insurance contract is oral or written."

* * * * *

In the Court's opinion (TR. P. 28) the court makes it clear that its decision is based upon an estoppel constituting the company's acceptance of the contract of temporary insurance found in this case. And there is ample authority for the court's position under Montana cases. In LINDBLOM V. EMPLOYER'S LIABILITY ASSURANCE CORP. 88 MONT. 488, 500; 295 P. 1007, the Court held:

> "Where a principal makes it possible through his acts for his own agent to inflict injury, the result of such injury should not be passed on to innocent persons who have dealt with the agent in good faith under his apparent authority. The law forbids the principal to deny authority in the agent, which his own conduct has invited those with whom he was dealing to assume he possessed. In such a case, a principal is bound

by his acts and estopped by his own conduct from denying the authority of the agent to act."

* * * * *

CONCLUSION

The Trial Court after hearing *all the evidence* (which the Appellant has not made available to the Circuit Court) submitted special interrogatories to the Jury (TR. P. 25). The Jury found that Everhard had indicated to the Smiths that their property would be insured on January 25, 1964.

Based on what actual authority the evidence disclosed Everhard to possess in his capacity as agent for Wyoming, the Court held as a matter of law that he had the implied authority to explain the acts which were within the scope of his actual authority and to thus bind Wyoming to a contract of temporary insurance. The Court held further that Wyoming could not deny that contract by relying on *general and undisclosed* limitations on the agent's power.

The Appellees submit that this is a decision which is not only sound on the law but which in all justice is the only result possible to reach on the facts.

It is respectfully contended that the Judgment of the District Court should be affirmed.

Respectfully submitted,

KNIGHT & DAHOOD

By .....

Attorneys for Appellees,
Curtis L. Smith and
Jamie L. Smith.

CERTIFICATE

I CERTIFY that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing Brief is in full compliance with those rules.

KNIGHT & DAHOOD

By .....

Attorneys for Appellees,
Curtis L. Smith and
Jamie L. Smith.

No. 21564

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EMMET WALTER WENDT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

ROBERT F. JOHNSON,
14401 Sylvan Street,
Suite 208,
Van Nuys, Calif. 91401,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases — Page

Statutes

No. 21564

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EMMET WALTER WENDT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Pleadings.

1. Indictment number 35831-CD returned February, 1966, Federal Grand Jury, filed February 23, 1966, in the United States District Court for the Southern District of California, Central Division. Forty-six Counts alleging violations of Title 18 U.S.C. Sec. 641 (receipt of stolen Government property; unauthorized sale of Government property) against various defendants, including Appellant, and One Count alleging a violation of Title 18 U.S.C. Sec. 371 (conspiracy).

2. Order entered pursuant to Rule 37 of the Rules of Criminal Procedure executed and dated August 25, 1966, by the Honorable Russell E. Smith, United States District Judge providing that the Notice of Appeal filed on July 29, 1966, by Appellant Wendt be considered as a Notice of Appeal filed within the time allowed by law.

3. Notice of Appeal dated July 12, 1966, filed by Appellant Wendt appealing the Judgment and decision of the Court to the United States Court of Appeals for the Ninth Circuit.

4. Designation of Record on Appeal filed by Appellant Wendt dated September 2, 1966.

Statement of Facts Disclosing Jurisdiction.

By virtue of the Indictment filed in the United States District Court for the Southern District of California Central Division on February 23, 1966, Appellant was named as a defendant together with certain others wherein it was charged in Counts 1 through 46, that Appellant and certain others had violated Title 18, U.S.C. Sec. 641; receipt of stolen government property; unauthorized sale of government property and in the last and 47th Count, a violation of Title 18 U.S.C. Sec. 371, conspiracy to commit offenses against the United States. Appellant Wendt was charged in Counts 12, 13, 35, 36, 40, 41, 45, 46 and 47 only. Appellant Wendt was adjudged guilty of Counts 12, 41, 46 and 47 only. A timely Notice for New Trial was made before the Honorable Russell E. Smith on July 12, 1966. The motion was denied and thereafter Appellant Wendt filed his Notice of Appeal from the Orders denying the Motion for Judgment of Acquittal; Motion for a New Trial and from the Final Judgment of Conviction entered in this proceeding on July 12, 1966.

In those Counts of the Indictment referring to Appellant Wendt hereinabove referred to, it was alleged in all expect the last and 47th Count, that Appellant Wendt and one Edward Mace S. Clark, without authority, sold, conveyed and disposed of certain aircraft

parts in Los Angeles County and within the Central Division of the Southern District of California, manufactured by Curtis-Wright, which Appellant Wendt and defendant Clark then and there well knew had been stolen and purloined from the United States.

In Count 47 which named all of the defendants named in the Indictment, including Appellant Wendt, it was charged that a conspiracy existed in violation of Title 18, Sec. 371 of the United States Code wherein the defendants were alleged to have unlawfully conspired and agreed together to commit offenses against the United States by receiving, concealing and retaining with the intent to convert to their own use, property of the United States having a value in excess of $100.00, knowing the same to have been stolen from the United States and further to sell or dispose of the same without authority. Appended to Count 47 were twenty-six overt acts alleged to have been committed by the defendants in furtherance of the conspiracy. Appellant Wendt was alleged to have participated in overt acts numbers 2, 3, 13 and 26. These overt acts were alleged to have been committed by Appellant Wendt at Los Angeles County and within the Central Division of the United States District Court for the Southern Division of California. The statutory provisions alleged to have been violated by Appellant Wendt in the Indictment are as follows:

TITLE 18 U.S.C. Sec. 371

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof,

in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

TITLE 18 U.S.C. Sec. 641

Public money, property or records.

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100.00 he shall be fined not more than $1,000.00 or imprisoned not more than one year, or both.

> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater. June 25, 1948, c. 645, 62 Stat. 725.

By virtue of the Indictment wherein a violation of the above Federal Statutes was charged, and that the Indictment names Appellant Wendt as having committed the offenses in Los Angeles County, the United States District Court for the Southern District of California, Central Division, had jurisdiction to hear and determine the validity of the charges against Appellant Wendt as contained in those Counts of the Indictment returned against him.

As to those Counts of the Indictment referring to Appellant Wendt, they appear in the Transcript of Record, Volume One, with the Counts and pages as follows:

COUNT	PAGE
12	13
13	14
35	36
36	37
40	41
41	42
45	46
46	47
47	48

Appellant Wendt duly filed his Notice of Appeal to the United States Court of Appeals for the Ninth Circuit pursuant to Rules 37 and 39 of the Rules of Criminal Procedure.

Statement of the Case.

History.

On February 23, 1966, the Federal Grand Jury of the United States District Court for the Southern District of California, Central Division, returned an Indictment charging nine persons, including Appellant Emmet Walter Wendt, with various Counts of a violation of Title 18 U.S.C. Sec. 641, and all of the defendants, including Appellant Wendt, with a violation of Title 18 U.S.C. Sec. 371. Prior to the trial, defendants Don C. Boone, Donald John Nastali and Harold Steel Gray, entered pleas of guilty to one Count alleging a violation of Title 18 U.S.C. Sec. 641, and to Count 47 alleging a violation of Title 18 U.S.C. 371. Disposition of the remaining Counts against these defendants was put over until the trial was concluded. These witnesses were called by the Government as a part of its case in chief. During the trial, defendant Wesley J. Coverdill, entered a plea of guilty to two Counts of the Indictment. The remaining defendants, including Appellant Wendt proceeded to a jury trial before the Honorable Russell E. Smith, Judge presiding on May 2, 1966, which concluded with a jury verdict on May 20, 1966.

Upon the close of the Government's case, Appellant Wendt moved the court for a Judgment of Acquittal on each of the nine Counts referable to him in the Indictment as hereinbefore set forth. After argument, the trial Judge granted Appellant Wendt's motion and ordered Judgment of Acquittal as to Counts 13, 35, 36, 40 and 45. Appellant Wendt then was required to stand trial on Counts 12, 41, 46 and 47. It was upon these latter four Counts that Appellant Wendt was

convicted and now prosecutes this appeal. Counts 12, 41, 46 and 47 which appear respectively on pages 13, 42, 47 and 48 of the Transcript of Record, Volume One, charge him with a violation of Title 18, Section 641 of the United States Code. The fourth Count, being number 47, alleges Appellant Wendt conspired and agreed with his co-defendants to commit an offense against the United States in violation of Title 18, Section 371 of the United States Code.

Count 12 of the Indictment alleged that between April 2, 1965, and September 15, 1965, Appellant Wendt and defendant Edward Mace S. Clark, received, concealed, with intent to convert to their own use, 127 Power Recovery Turbine Wheels (P.R.T. Wheels); 262 Pistons; 27 Shields; 10 Gears; 50 Impeller Shafts, all manufactured by Curtis-Wright, and having a value in excess of $100.00, which, it was alleged, Appellant Wendt and defendant Clark, then and there knew had been stolen from the United States.

Count 41 alleged that on or about July 8, 1965, Appellant Wendt and defendant Clark sold and conveyed of 35 P.R.T. Wheels, which had been manufactured by Curtis-Wright and having a value in excess of $100.00 and which property, Appellant Wendt and defendant Clark then and there well knew had been stolen from the United States.

Count 46 alleged that on or about August 27, 1965, Appellant Wendt and defendant Clark, sold and conveyed of 515 Pistons, which had been manufactured by Curtis-Wright and having a value in excess of $100.00 and which property, Appellant Wendt and defendant Clark then and there well knew had been stolen from the United States.

In Count 47 it was generally alleged that prior to December 1964, and continuing until November 15, 1965, all of the defendants, including Appellant Wendt, combined, conspired and agreed to commit offenses against the United States by receiving, concealing and retaining with intent to convert to their own use, property of the United States having a value in excess of $100.00 and further without authority to sell, convey or dispose of property of the United States of such value or more and knowing then and there that such property had been stolen from the United States.

In Count 47, hereinafter referred to as the "Conspiracy Count", twenty-six overt acts were alleged in which Appellant Wendt was named as having participated in numbers 2, 3, 13 and 26.

Abstract of the Evidence Presented.

During the trial which lasted from May 2, until the return of the jury with its verdict on May 20, 1966, the Government called numerous witnesses in order to establish its theory of the case. The Government's theory and presentation of the evidence, both real and verbal, was designed to show that certain civilian employees at the Alameda Naval Air station at Alameda, California, had access to various parts which were used as replacement parts on an aircraft engine manufactured by Curtis-Wright in New Jersey. These engine parts were stored in huge warehouses, being a Government facility in the Naval Air Station at Alameda. The Government's theory was that certain civilian employees agreed to pilfer some of these parts from the Government; take them off the base without authorization and sell them to various persons. The parts consisted mainly of Pistons, Gears, P.R.T. Wheels,

Shafts and Shields. *All* of these parts were components of a large aircraft engine manufactured by Curtis-Wright and known by the designation of 3350.

It was alleged by the Government and its order of proof sought to show that after the civilian employees at Alameda took some of these parts off the base, they were sold to other civilians in the San Francisco area, who in turn conveyed them to others and who later sold them to aircraft parts dealers in the Los Angeles area. Appellant Wendt was shown to have been in the parts business in Los Angeles for at least fifteen years and was doing business as Western Engine and Supply. In the ordinary course of his business, Appellant Wendt purchased and sold some of the parts similar to those the Government claims had been taken from the Base at Alameda.

It was and now is the Government's intention that not only did Appellant Wendt receive, retain and convey such aircraft engine parts but that he did so with full knowledge *at that time* that the parts, having a value in excess of $100.00, had been stolen from the United States Government. This alleged conduct is set forth in Counts 12, 41, and 46 of the Indictment. In presenting evidence in support of Count 47, the Government sought to show that Appellant Wendt and others, including his co-defendants, conspired together to receive, retain and sell these aircraft engine parts with the knowledge that they had been stolen from the United States Government. By evidence revealed on cross-examination of the Government's witnesses and the presentation of the case in chief and in addition the evidence produced by his co-defendants, Appellant Wendt demonstrated that in his dealings and conduct, as de-

nounced against him in those four Counts upon which he was adjudged guilty, he was acting in the usual and ordinary course of business as practiced by numerous other business enterprises of this kind and was not acting unlawfully in any manner.

History of the Evidence.

Because the facts dealt with personal property consisting of aircraft engine spare parts manufactured by Curtis-Wright on the East Coast and shipped by them to a Navy Facility at Alameda, California, and thereafter taken from Alameda and passed through several hands, individual and corporate, it appears useful to summarize in skeleton form at this point the history of the evidence produced to spell out chronologically the case presented to the jury. The testimony of the witnesses for the Government and the defendants disclosed this chronology:

Elmer Sturm, employed by Curtis-Wright in 1965 as a supervisor, identified numerous physical exhibits present in the courtroom at the beginning of the trial. Sturm identified not only actual physical pictures such as piston, P.R.T. wheels and gears but also shipping tags and other paperwork used in the manufacture and shipping of these items. Sturm testified that the parts are modified constantly and that on numerous parts, shield for instance, he could not tell whether Curtis-Wright had made such a shield because it had no serial number on it. Sturm also testified that after final inspection at Curtis-Wright, no record is kept of any part that might happen to have a serial number on it. Further, he testified that because of the unique nature of the aircraft parts business, Curtis-Wright had even re-purchased some of their own parts back

from other people in the industry to supply a demand from still another person.

Next, because the Government was apparently warned that these people would decline to testify on the grounds that they would incriminate themselves, the Court called as it own witnesses three people; Willard Leon Johnson, also known as Willie Leon Johnson; C. B. Butler and Tony Vierra. Johnson declined to answer any questions on direct or cross-examination and was excused. Butler admitted being employed at the Naval Air Station at Alameda and agreed that he had "access" to the supplies stored there. He said that he could not say one way or the other whether or not the boxes he examined in the courtroom were similar to the ones stored at the Alameda warehouse. After answering these questions, he declined to testify further. Vierra also admitted being a truck-driver but after this admission, declined to answer further questions on the same grounds.

Henry L. Ainliy, Jr., as a Commander in the United States Navy and assigned as the Control Division Officer at the Naval Air Station at Alameda, next testified concerning certain records and explained how overages and shortages are maintained according to certain paperwork. His testimony was limited largely to an explanation of how the records were kept and admitted on cross-examination that he could not tell in spite of his experience and assignment, whether certain paperwork belonged to the Government or to a private citizen. In fact, this witness testified that some of the exhibits introduced were not even prepared under his direction and control but by a civilian supervisor at the same station. When questioned concerning

a box in the courtroom which contained a part similar to those described in the Indictment, he admitted it was impossible to say whether the box had ever been received in the Naval Air Station at Alameda.

Harry Buxton, a civilian employee at Alameda, was produced by the Government to identify certain paper records and tags kept in an overhaul shop at Alameda. Some of these records were not official but were kept by employees for their own personal reasons.

James C. Clemons, called by the Government, admitted he was employed as a civilian at the Alameda Naval Air Station but admitted he never had seen any of the Indicted defendants on trial until he came to the courtroom. When asked directly by the Prosecutor whether he stole some parts from the Naval Air Station, he said he did not take them but he made them "available" and they were taken off the station with his knowledge by a man named Butler. Clemons stated that he and Butler drove a truck off the Alameda Naval Air Station to a man's house in San Leandro and that he had had conversations with defendant Harold Gray and Vierra. He admitted at the trial he was still working at his regular job at Alameda, had not been indicted or charged with any crime by any agency or had been disciplined for his conduct by his employer. When cross-examined concerning some of the physical evidence in the courtroom, he was unable to identify it stating that he could not tell whether or not they had come from his place of employment although he recognized that there were many boxes at the warehouse close to the size of those he saw in the courtroom. His testimony clearly indicated he was dealing primarily with Tony Vierra and he denied that Gray

was buying the goods from him. Donald John Nastali, although indicted, was called as a Government witness after he had entered a plea of guilty to two of the 21 Counts for which he was indicted and was allowed to testify in narrative form. His testimony was interrupted at the beginning by the Court, granting all defendants a "continuing objection" to the testimony and its admission subject to "the ultimate proof of a conspiracy". Nastali outlined that in December, 1964, he had Gray as a partner in his company known as Aero Service in Burbank, and that it was in the aircraft surplus parts business. Further, Gray, while in San Francisco, had the opportunity to buy certain parts, telephoned Nastali and obtained money to buy the parts which were later sold to James Boone in the Bay Area. Apparently Gray's ability to obtain these parts occurred when he met Vierra in a crap game. Because of their experience in the aircraft parts business, Nastali and Gray importuned Vierra to obtain parts for them for resale. Vierra, not realizing the value of these parts, in turn importuned Clemons, Johnson and Butler to obtain them from Alameda.

During the above process, Nastali and Gray obtained these parts and took them to James Boone at his aircraft parts shop. Gray and Nastali told James Boone that they received the material from out of state and that it was surplus.

At Gray and Nastali's business address at Burbank, known as Aero Service, they had some of the parts on display with other material in their store. Gray telephoned defendant Edward Mace S. Clark asking him if he knew anybody who could use any P.R.T. Wheels. During this conversation price was discussed and Clark

indicated the necessity of financial backing in order to purchase them. Clark obtained the necessary purchasing from a Jack Leverwich who purchased some P.R.T. Wheels from Gray and Nastali. Leverwich paid Nastali and Gray but was never indicted for any offense.

Wesley J. Coverdill, a defendant who decided to change his plea during the trial, was identified as a truckdriver who went from the Los Angeles area to Alameda to pick up some of the parts. After Nastali and Gray had returned from the Bay Area with more material, they stocked their shelves at Aero Service with it and thereafter Clark in the usual course of his business came in and saw the material. Clark inquired if the material was for sale and Nastali indicated it would probably go to James Boone because of his prior purchases of similar material from Aero Service. Indicating interest in the material, Clark asked its price and was told $10,000.00. Some days later Clark walked in with Appellant Wendt who likewise indicated interest in the material explaining he had been in the parts business for more than fifteen years and inquired as to price and terms. Two days later, Appellant Wendt returned offering to pay $10,000.00 for the parts with $5,000.00 down and the balance later. This partial payment was made and Appellant Wendt took a portion of the material, namely, P.R.T. Wheels, at that time. This transaction was made in the ordinary course of business with checks and receipts as evidence of the transaction. The balance of the $10,000.00 was paid by Appellant Wendt within a week. Further purchases were made by Wendt from Aero Service in the usual and ordinary course of business. Nastali admitted readily that the parts business is very unique and that many people conduct a rather large operation from small fa-

cilities or even their home. Further, Nastali admitted that the value of the location of a particular set of parts is the key to success in this business. He further stated that for so long as he could remember there was no standard mark-up on parts and that it was quite customary to sell parts by the "Lot" rather than designate each part by serial number, part number or other extensive description. Nastali concluded his testimony by reiterating that he had sold numerous parts to James Boone that he felt were stolen but that James Boone bought in the ordinary course of business and for which he was never charged or indicted. On cross-examination, Nastali admitted that he double-crossed his partner, Gray, and made at least $10,000.00 on these "side transactions".

Milford Ingham called by the Government, identified himself as an employee at Alameda who had done rework on the P.R.T. Wheels. He admitted the P.R.T. Wheels go practically all over the world and may be overhauled in Japan, San Francisco or any place else. After reworking one of the wheel exhibits to him, he stated he never saw it after 1960.

Don C. Boone, (no relation to James Boone) acted as the truck driver for Gray and Nastali and testified that on one occasion Appellant Wendt was present with a Mr. Paul Long who purchased parts from Nastali and Gray in the Bay Area. Don Boone first met Appellant Wendt on March 17, 1965, when Boone, Nastali and Coverdill were drinking and Wendt entered the restaurant for a few brief moments and then left. Boone admitted several times under cross-examination that he had never had any inkling until this time that any of the material that he was trucking was

stolen and further admitted that such conversations or information came to him *after* Appellant Wendt had left the restaurant after a brief visit. Don Boone agreed with Nastali to doublecross Gray and to obtain parts from Alameda without his knowledge and without splitting up the profits with Gray. He further admitted that after making this doublecross agreement with Nastali, he immediately left the restaurant and went to Gray's house and took $2,900.00 from him. Don Boone admitted under cross-examination that Appellant Wendt had never given him a single cent and that he had not delivered any material of any kind to Appellant Wendt at anytime.

James McCauley, an agent for the FBI was called by the Government to identify several parts which had been recovered from California Air Motive Company in North Hollywood and from other persons, firms and corporations in the area. McCauley testified that he recovered nothing from Mr. Wendt, although Wendt's home, garage and premises had been searched under the authority of a search warrant. McCauley admitted that he had several conversations with Appellant Wendt and that Wendt was extremely cooperative in producing checks, vouchers, receipts and other records concerning Wendt's transactions with Aero Service. McCauley pointed out that Wendt was not secretive in his discussions with the FBI but that he actually had dug through his records to provide as much information as possible for the evidence of the Government. In Fact, Wendt even disregarded the advice of his own attorney up to a point by providing access to his records for the use of the Government. At no time during his discussion did Wendt state or even hint that he was aware that

the material that he had purchased might have been stolen from anybody.

Francis J. Christian, called by the Government, stated that he was an aircraft mechanic and inspector with long experience. He stated that he had examined certain material in San Francisco at the request of Clark as to its acceptability for use in the Curtis-Wright engine. On cross-examination Christian admitted he was undergoing a naturalization process and would definitely stay clear of anything that might jeopardize his application.

Jack Lebovitz called by the Government, testified that Clark advised him that Nastali and Gray had surplus aircraft parts for sale and as a result of this Lebovitz purchased $2,500.00 of the parts. Lebovitz stated it was common practice in the business never to inquire from the vendor of such parts as to their source and further that he had no qualms or reason to suspect anything wrong with the parts or their source when he bought from Gray and Nastali. In turn, Lebovitz sold the parts he had purchased to Aircraft Cylinder Company, who later did not inquire as to their source. Neither Lebovitz or Aircraft Cylinder was ever charged or indicted.

William Jones, doing business as Aircraft Cylinder Parts, testified that he purchased the items from Lebovitz and that he had no reason to suspect anything being wrong about their title. He testified that the aircraft parts business is a "very unique one" and that it is a top trade secret as to the location of various parts which may be in demand throughout the world. He further explained to the jury that the mere fact that the boxes or packages containing aircraft en-

gine parts has certain serial numbers, markings or other designation is given little significance from someone in the trade.

James G. Boone, called as a witness by the Government, is and was in the aircraft part sales business. He testified that he purchased some Aero Service (Gray and Nastali) Curtis-Wright engine parts and that he had been approached by Gray in February of 1965 who asked him if he was interested. His business relationship with Gray and Nastali continued from February through July, 1965. He testified that on one occasion he purchased 65 pistons for $25.00 each and sold them for $100.00 each for a 300% profit. He testified that this was not unusual at all in this business and that during his dealings with Gray and Nastali he netted approximately $25,000.00. As a part of this profit, he testified that he purchased some P.R.T. Wheels from Gray and Nastali for $250.00 and sold them for $1250.00 for a net profit of $1,-000.00. Boone testified that the parts that he bought from Gray and Nastali, he turned around and sold to Grand Central Aircraft Company; Northwest Airlines; Trans Air Supply Company, United Airlines and the Air Motive Inc. Although James Boone had previous dealings with Nastali and Gray he has never been charged or indicted for any crime in connection with his transactions with them.

R.D. MacKenzie, called by the Government, testified he is also employed by Air Motive Inc. as sales manager and that in behalf of his company he purchased Curtis-Wright engine parts from Appellant Wendt, specifically 515 pistons. These pistons were obtained from Western Engine and Supply (Wendt) without any hint or suspicion that they had been stolen from

anybody or any suspicion as to their source. MacKenzie was familiar with James Boone and his company and the engine in question (3350). MacKenzie has known Wendt for approximately eighteen years. MacKenzie verified that the aircraft parts business is unique and unusual and that it is very customary to buy parts by the "lot" and that the amount of price mark-up varies extremely. MacKenzie testified that some of the parts he sold to airlines and that the rest were recovered by the U.S. Marshal at the time the defendants were arrested. MacKenzie testified that at no time during his eighteen years of business dealings with Wendt did he have any reason to suspect Wendt or the manner in which he conducted his aircraft parts business.

Robert J. Dixon, called by the Government, this witness stated he did business as Sky Parts Incorporated and that he discussed a purchase from Appellant Wendt of certain aircraft parts. He further confirmed that it is not a general practice in any business to ask the source of the material, it being a trade secret to all concerned. He described a purchase from Western Engine and Supply (Appellant Wendt) as a courtesy for a Mr. Nielsen. He confirmed further that in his business dealings with Wendt it was equitable all the way through and that he had no reason for suspicion and that his dealings were all in the ordinary course of business as he had conducted them throughout his career. Dixon further testified that the purchase was made for the purpose of re-sale which is a customary method of making a profit in this business.

Raymond Connors—This witness had no dealings with Western Engine and Supply of any kind.

Robert C. Holmes—This witness, a member of the FBI, identified certain parts and documents and confirmed the testimony of the preceding witness as to the chronology of sales and multiple re-sales of the material.

Emmet Walter Wendt (Appellant)—This witness testified in his own behalf and related in substance that he had been in the aircraft parts business for eighteen years. Further, he had been a consultant for Atlas Corporation in New York and International Aircraft Services. He testified that he has had contracts with the United States Air Force for as high as $700,000.00. He has done business with many many parts dealers throughout the U.S., Canada, Central America, South America, Italy and Europe. He has seen parts identical to those displayed in the courtroom as being the aircraft engine parts described in the Indictment as far away as Sao Paulo, Brazil, and also in the possession of Varig Airlines. He testified that as a general rule purchases and sales are made on a "lot" basis. That they are made from Governments who are selling surplus such as the United States, South American and European Governments. He read from an aviation sealed bid sale, dated August 13, 1965, from Norfolk, Virginia, a publication put out by the Federal Government. He identified this as one of the documents he receives by being on the U.S. Government mailing list. Appellant Wendt testified he *did not* know who the owners were of Aero Service prior to April, 1965, although he vaguely remembers such a company existed. He never had any dealings with Aero Service prior to April, 1965, or with its owners, Nastali and Gray. He testified that he has a bonded warehouse in Dallas, Texas, and that he has a number of engines for sale

there when the opportunity presents itself. He testified that when he went into Aero Service he saw shelves with numerous parts on them for inspection and which were for sale. At that time, he had a conversation with Nastali concerning the possible purchase of some of these items. On the first occasion he discussed purchasing shafts and gears. Nastali wanted to sell these parts as a "lot". In fact, Nastali insisted on selling the "entire lot". The asking price was $10,025.00. Appellant Wendt replied he would purchase the lot for $10,000.00, stating to Nastali that the P.R.T. Wheels were a good item and similar to those he had seen at the Fiat overhaul base in Toreno, Italy. Nastali agreed to the sum of $10,000.00 for the entire lot and Wendt stated he wanted to pay $5,000.00 at that time, take the P.R.T. Wheels for inspection and later on check on the remaining material and make the balance of the purchase price. Nastali wanted the money in cash, although Wendt had sufficient funds in the bank to write a check for $5,000.00. Wendt testified that it was not unusual to demand cash, in fact the Federal Government requires a certain portion to be paid in cash or certified check when it sells surplus parts to any buyer. Wendt cashed his own check for $5,000.00 and purchased the material and received a receipt therefor. Wendt called an inspector (witness Frank Christian) who inspected the parts and found them to be in accordance with the specifications required by Wendt's purchasers. Appellant Wendt flatly and categorically denied that at any time Nastali informed him that the parts were stolen or made any statement to hint that they were anything but legitimate merchandise. Appellant Wendt further described that he had had some seven transactions with Aero Service after April, 1965,

and that he had purchased wheels, pistons, impeller shafts and gears. Wendt denied that he ever knew Tony Vierra, C. B. Butler, Clemons, Willie Leon Johnson, or any of the other individuals connected with Alameda Naval Air Station. He testified that some of the P.R.T. Wheels he had purchased from Aero Service were sold to a Mr. Happe in New York for resale back to the Curtis-Wright factory. He further identified the sale of 515 pistons to Air Motive for $50.00 per piston, having purchased them for $30.00 each. Wendt further testified that he travels by airplane between 75,000 and 100,000 miles a year, visiting various places where aircraft engine parts are bought or sold. During his eighteen years of experience he has never been charged with any crime or improper practice in his business or otherwise until this Indictment was returned against him.

Wendt testified that in so far as the overt acts alleged against him in Count 47 of the Indictment are concerned, and specifically overt act 2, he might very well have had a conversation with Edward Mace S. Clark on or about April 1, 1965. That this would be possible because Clark had advised him of a possible source of useful parts at Aero Service. That any such conversation was innocent and not in the course of any conspiracy but actually in the ordinary and usual course of his legitimate business. That in so far as over act 3 (Count 47), he did pay the balance of the purchase price of the parts to Aero Service to one of its owners, Gray. In so far as overt act 26, he did pay to Aero Service, $5,000.00 on or about April 20, 1965, as the downpayment on that portion of the first lot of parts purchased from Aero Service. That this payment was not part of any conspiracy whatsoever but

was in the usual and ordinary course of business. In so far as overt act 13, he met Mr. Don C. Boone for the first time in a restaurant somewhere in the Bay Area and that at no time did he have any telephone conversation with Don C. Boone. Appellant Wendt further recounted that his purpose in going to the Bay Area was to contact Mr. Dixon in furtherance of a legitimate and usual aircraft engine parts sale and for no improper reason.

Appellant Wendt testified as to his conversation with FBI agent McCauley and his cooperation in the production of business records, checks, receipts and other facts for evidence. He quoted McCauley as stating that he (McCauley) realized that the custom and source of where aircraft parts were purchased was a confidential matter, however, that he as an FBI agent was conducting an investigation and would appreciate assistance. Wendt advised McCauley he would be happy to cooperate and disclose evidence available to him upon request by McCauley. Wendt further outlined his discussions with his corporate attorney, Jack Swink, who advised Wendt that if the FBI happened to contact a customer that it would jeopardize future business relations. Although Wendt finally did heed his lawyer's counselling, he stated to McCauley that he wished very much to assist further but that since he had an attorney he felt it wise to follow the advice given.

Russell E. Randall, Brig. Gen. USAF—This witness called by the defendant Magdalik, testified that he is a Brigadier General in the United States Air Force, having graduated from West Point in 1925, and had been in the Air Force until 1949, at which time he retired. He was assigned to Korea to assist in the South

Korean Air Force during which time he was instrumental in buying and selling materials to the South Korean Air Force from several surplus outlets. This included the U. S. Government surplus market. He joined a corporation in Washington D.C. known as Defense Export Corporation which dealt solely in surplus buying and selling. By virtue of his experience, he was well familiar with surplus aircraft parts and particularly the boxes in which they were shipped. He testified that sometimes there is and sometimes there is not something on the boxes to indicate the source of the material contained therein. Sometimes they were sold in open lots; sometimes by weight; and sometimes by classification or nothing at all. On cross-examination by the Government lawyer, the General was handed an exhibit indicating that the contents of the box was manufactured by Curtis-Wright. In answer to the question as to its source, he testified that the markings on the box would not indicate its source or who disposed of it or where it might come from.

Herson B. Clampitt—This witness called by Appellant Wendt testified that he is a Vice-President of the Bank of America and Manager of its Toluca Lake Branch, and has been associated with the Bank for over forty-two years. Clampitt has known Wendt for 13 years and in a business capacity for about 10 years, maintaining a business and personal account at Clampitt's Branch under the name of Western Engine and Supply Company. During this period of time, Clampitt as agent for the Bank, has made numerous loans to Wendt in his business enterprises and testified that they were all done in the usual and ordinary course of business with no suspicion ever arising from any transaction.

Questions Involved and Specification of Errors.

1. The Trial Court erred in refusing to grant the motion of Appellant Emmet Walter Wendt for Judgment of Acquittal of the offenses charged in Counts 12, 41, 46 and 47 of the Indictment.

2. The evidence is insufficient as a matter of law to justify a finding of guilty as to Appellant Emmet Walter Wendt as to Counts 12, 41, 46 and 47 of the Indictment for the reason that there is no competent evidence to show that Appellant Wendt sold, received, concealed or retained any property with intent to convert it to his own use or gain knowing the same had been embezzled, stolen or purloined *from the United States of America.*

I.

The Trial Court Erred in Refusing to Grant the Motion of Appellant Emmet Walter Wendt for Judgment of Acquittal of the Offenses Charged in Counts 12, 41, 46, and 47 of the Indictment.

The heart of Appellant Wendt's contentions is pointed up by the remark of the Trial Judge during Wendt's motion for Judgment of Acquittal after the Government's case. Following the remarks of Wendt's counsel during the opening portion of his argument pursuant to Rule 29, the following occurred:

> "The Court: You see what I am concerned about and my only concern is that is there anything here from which we can't infer that he knew that this was stolen from the United States. If that's essential—I don't know. That seems if a fellow goes out and buys poperty that he knows to be stolen, I think he should be stuck with it if it happens to be stolen from the United States. Maybe that isn't the law but—
>
> Mr. Rogan: Your Honor, may I interrupt and cite you a case which has that kind of language in it?
>
> The Court: Yes, if you have got a case on that.
>
> Mr. Rogan: Just while you bring up that point, that's the case of Sousa against the United States.
>
> Mr. Barnett: I gave that to the Court.
>
> Mr. Johnson: I will agree, Your Honor, You see—
>
> Mr. Rogan: Excuse me, Mr. Johnson. Let me read this one paragraph from the Sousa case. 'Not only was the jury instructed but the prose-

cution was required to prove beyond a reasonable doubt that the property described in Counts 2, 3 and 4 was the property of the United States; that the same was sold or conveyed by appellant without authority and that each sale or conveyance was made by appellant with knowledge on his part of ownership of the property by the United States but also with knowledge that the property had been stolen from the United States.'

Mr. Johnson: That was my understanding of the law, Judge.

The Court: That seems to bear out your statement."

The Government's case relied and must now stand heavily on the proposition that Wendt *knew in fact* that the pistons, P.R.T. wheels, shafts, gears and shields which he bought from Aero Service in the several transactions in the few months he dealt with Aero, were in truth and in fact stolen from the *United States Government*. Unless the evidence is sufficient *as a matter of law* to establish this peculiar type of knowledge, no *Federal* offense has been committed. Therefore, from the remarks of the Honorable Russell E. Smith, who, as the Trial Judgment made the above observation, it would appear that Wendt even though he buys property that he knows to be stolen, he can not be "stuck with it" if it *happens to be stolen from the United States*. The Trial Judge, indicating that this was not perhaps the law, is still therefore bound by the law on this subject which states as follows:

"Mere omission from U.S.C. 641, which makes it a criminal offense to embezzle, steal, purloin or knowingly convert Government property, or to

receive, conceal or retain the same, knowing it to have been stolen, of any mention of intent, will not be construed as eliminating that element from the crime denounced."

Morisette v. U.S., 342 U.S. ...., 96 L. Ed. 288, 72 S. Ct. 240.

A careful reading of Section 641 of Title 18 of the U.S.C. leaves out the word "intent". This word is supplied by *Morisette*. In other words, in order to commit a violation of Section 641, it is necessary that one either buy, sell, convert or retain certain property, *all the while knowing* that it has been stolen or purloined from the United States.

The only testimony adduced by the Government pointing towards Wendt as having this guilty knowledge comes from defendant Nastali who testified as follows:

"So we turned around there and we said, 'well, you know this stuff is stolen to start with,' and Mr. Wendt says 'Yes.' He says, 'Yeah, but there is no problem.' He says, 'I can cover up for this material being here.' He says, 'Well, how'—Mr. Wendt says, Well, I've got—I just got through buying out an inventory in South America.' And if he did or not, I don't know. An airline inventory.

He says, 'I can tell people it came from there and if worst come to worst,' he said, 'I can always ship it back to South America to cover it back up and then ship it back here to cover it up.'

And I said, 'Okay, swell.'" [R. T. Vol. 2, p. 322, lines 7-19].

No reasonable person could infer or even speculate these words that the property had been stolen from a *particular source* and more particularly from the United States Government.

The only other possible evidence that could point to the character of the victim from whom anything had been stolen, appears in the testimony of defendant, Don C. Boone, who testified:

> "Q. Now, prior to that sir, had there been any conversation about the material itself? A. Yes, sir, there had. We were sitting—we were sitting there talking—
>
> Mr. Johnson: May we have an identification as to who was present, Your Honor? A. Myself, Mr. Wendt, Mr. Long, and Mr. Clark.
>
> Q. (By Mr. Barnett) Continue sir. A. We were sitting in the booth talking and Mr. Long wanted to know if there had been any trouble getting the items through the gate. And I said, 'No, it's already at my house. It's already there.' And then Mr. Wendt said, 'There had never been any problems in the past.' So then we went over to my bank where I deposited—I had to deposit at my bank. It's a small branch, and it's a very small branch, and they didn't have enough money to cash these items. So I had to deposit it to my account. I wrote a check there for $10,000.00 which Mr. Long and myself counted out. Mr. Long kept the money in a large envelope, and we went from there to the Elmhurst branch which Mr. Wilcox who runs the branch, the bank where I do the business, had called to clear the check, and I wrote another for $8,000.00, which again Mr. Long kept

> until we got over to my house. When we got at my house after Mr. Long and Mr. Clark and Mr. Wendt had all inspected the material and took an inventory on it, then they gave me the large envelope. Mr. Long and Mr. Wendt got in the truck and left. Where to, I don't know. Where to, I don't know. I assume they were going to Mr. Long's place of business in Redwood City." [R. T. Vol. 3, p. 515, line 9, to p. 516, line 15].

Here again, there is no mention made of any fact fom which it can be inferred that the property being discussed was *stolen* from the *Federal Government.* It would thus appear that at the time counsel for Appellant Wendt moved the Court for Judgment of Acquittal as to the then nine Counts of the Indictment upon which he was charged, the Trial Court was proceeding under the mistaken belief that simply because a fellow "goes out and buys property that he knows to be stolen" he should be "stuck" with it if it *happens* to be stolen from the United States. It is interesting to note that in Count 12 of the Indictment, upon which Wendt was found guilty, that he is charged therein with what is commonly known as "receiving" certain engine parts with the knowledge that they were stolen from the Federal Government. In the very next Count (13), Wendt is charged with selling this very same property with the identical knowledge. Since the evidence is practically without dispute that Wendt sold certain items, some of which are described in Count 13, to Air Motive Inc., and upon which Count (13), his motion for Judgment of Acquittal was granted, is it possible that he "forgot" about the stolen character of the parts and further that they were stolen from the United States?

The Government makes much of the fact that Wendt was associated with or did business with other airplane engine parts dealers and inferred that there is something wrong with this. The law on this subject is indeed broad but not all of it is in favor of the prosecution side of the fence.

> Presumptions of guilt of conspiracy are not lightly to be indulged from mere meetings.
>
> *United States v. Di Re,* N.Y. 1947, 332 U.S. 581, 92 L. Ed. 210, 68 S. Ct. 222;
>
> *Rent v. U.S.,* CA Tex. 1954, 207 F. 2d 893.

> Conspiracy cannot be established by mere inferences no more valid than other equally supported by reason and experience.
>
> *Reiss v. U.S.,* CA Mass, 1963, 324 F. 2d 680.

> Guilt of conspiracy may not be inferred from mere association.
>
> *Evans v. U.S.,* CA Cal. 1958, 257 F. 2d 121;
>
> *Causey v. U.S.,* CA Ga. 1965, 352 F. 2d 203.

> Evidence of conspiracy even if circumstantial must be such as to establish beyond reasonable doubt a defendant's agreement to, or participate in place to violate the law.
>
> *United States v. Webb,* CA Ky. 1966, 359 F. 2d 558.

> Neither association with conspirators nor knowledge that something illegal is going on by themselves constitute proofs of participation in conspiracy.
>
> *United States v. Webb, supra.*

Conspiracy may not be inferred from mere association and trial judge must guard against such possibility any scrutinizing evidence as to each defendant before submitting case to jury.

United States v. Hickey, CA Ill. 1966, 360 F. 2d 127;

Panci v. U.S., 5th Cir. 1958, 256 F. 2d 308;

United States v. B. Bufalino, 2nd Cir. 1960, 285 F. 2d 408.

Perhaps the best and most succinct statement of the absolute requirements of a violation of Section 641 of Title 18, U.S.C. is set forth in *Cohen v. U.S.,* N.Y. 1919, 258 Fed. 355, wherein the requirements for conviction were set forth as follows:

"It is incumbent upon the Government to prove beyond a reasonable doubt;

(a) That the property was in fact stolen from the United States;

(b) That the defendant received or retained in his possession with intent to convert to his own use or gain; and

(c) That he received or retained it with *knowledge* that it had been stolen from the *United States.*" (Emphasis added).

Since there was no retreat by the Trial Judge from his guidelines announced during his ruling on Appellant Wendt's motion for Judgment of Acquittal after the Government's case [R. T. Vol. 6, p. 1127, lines 4-12] and because of the unusual nature of the rulings of the Trial Court on the Motion as they affected Counts 12 and 13, Appellant Wendt submits that the Court erred in allowing Counts 12, 41, 46 and 47 to remain for the jury's consideration.

II.

The Evidence Is Insufficient as a Matter of Law to Justify a Finding of Guilty as to Appellant Emmet Walter Wendt as to Counts 12, 41, 46 and 47 of the Indictment for the Reason That There Is No Competent Evidence to Show That Appellant Wendt Sold, Received, Concealed or Retained Any Property With Intent to Convert It to His Own Use or Gain Knowing the Same Had Been Embezzled, Stolen or Purloined From the United States of America.

In recognizing the absolute requirement that Appellant Wendt be saddled with *actual knowledge* of the two elements concerning property which he received, retained or sold, namely that they were in fact *stolen* and further that they were stolen from the *United States Government,* the prosecution attempted to satisfy its burden by the character of the meetings between Wendt and Aero Service (Nastali and Gary). The prosecution was unable to demonstrate any prior dealings between Aero Service and Appellant Wendt and but for a volunteered statement by Nastali without any apparent reason on his part or motive for gain (indeed it would seem that such a statement would have killed a sale to a stranger) the Government presented no competent or sufficient evidence to implant the absolutely required element of "stolen Government property" in the mind of Wendt. There is no question in the mind of anyone now familiar with the aircraft engine parts business that it is a unique and unusual one.

All of the witnesses familiar with the business, or engaged as such, agree that knowledge of the location and value of a particular part is a highly-kept trade secret. No one as buyer or seller, expects the source to be disclosed and it appears unusual to even ask.

The overt act charged against Appellant Wendt in Count 47, of the Indictment as number 2 [Tr. of Rec. p. 48, lines 31-33], is certainly an innocent bit of conduct by both Appellant Wendt and Clark because Clark was apparently unable to purchase the material at the asking price and it may reasonably be inferred that on or about said date Clark advised Appellant Wendt of the existence of these materials and that following such advice Wendt became interested [R. T. Vol. 2, p. 319, lines 13-16].

The overt act charged as number 3 in Count 47 of the Indictment [Tr. of Rec. p. 49, lines 1-3] was obviously the proper payment for the purchase of parts previously discussed as was the conduct described in number 26 of the overt acts of the Indictment [Tr. of Rec. p. 49, line 29, to p. 50, line 1].

It is not the intention of Appellant at this time to review each and all of the exhibits referred to or admitted into evidence. These exhibits included aircraft engine parts, not only of heavy weight but of greasy description. The paperwork indeed required many hours of review and likewise will not be dissected by Appellant Wendt. The crux of this case and the obvious tenor of the defense present at the time of trial and indeed upon this appeal by Appellant Wendt is that;

(a) There was insufficient evidence to show that Wendt knew the property was stolen; and

(b) That he received, retained or conveyed the same *with knowledge* that it was in fact *stolen* from the United States.

It is therefore respectfully submitted that the Court erred in refusing to grant Appellant Wendt's motion for

Judgment of Acquittal as to Counts 12, 41, 46 and 47 and that the evidence is insufficient to support a conviction thereof as set forth in the Indictment. Appellant Wendt therefore requests that the Judgment be reversed and that because of the insufficiency to establish the commission of the Federal offenses charged, that a Judgment of Acquittal as to these remaining Counts be entered.

Respectfully submitted,

ROBERT F. JOHNSON,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT F. JOHNSON

JR.,

,
,

,

90012

United States of America.

NO. 21564

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMMET WALTER WENDT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
ROGER A. BROWNING,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

NO. 21564

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMMET WALTER WENDT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
ROGER A. BROWNING,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

NO. 21564

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMMET WALTER WENDT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On February 23, 1966, a forty-seven count indictment was returned by the Grand Jury for the Southern District of California [C. T. 2-51]. 1/

The indictment charged Don C. Boone, Donald John Nastali, Harold Steel Gray, Joseph Anthony Magdalik, Louis P. Barrios, Emmet Walter Wendt, Edward Mace S. Clark, Frank Yochan and Wesley J. Coverdill with violations of Title 18, United States Code, Section 641 and Title 18, United States Code, Section 371. The

---

1/ C. T. refers to Clerk's Transcript of Record.

first forty-six counts of the indictment charged various combinations of the defendants with receiving, concealing and selling aircraft engine parts having a value in excess of $100, which parts as the defendants knew had been stolen from the United States Government. Count Forty-seven charged all of the defendants with a conspiracy to obtain, receive, conceal, possess and sell the items of Government property which were listed in Counts One through Forty-six.

Appellant Wendt was charged in Counts 12, 13, 35, 36, 40, 41, 45, 46 and 47 of the indictment [C. T. 12, 13, 35, 36, 40, 41, 45, 46 and 47-50]. At the close of the Government's case the court granted appellant's motion for judgment of acquittal on Counts 13, 35, 36, 40 and 45 [R. T. 1139, lines 3-5]. 2/ Appellant's case went to the jury on Counts 12, 41, 46 and 47.

Count 12 charged that on or about April 2, 1965 and continuing to September 15, 1965 defendant Edward Mace S. Clark and appellant Elmer Walter Wendt, received, concealed, with intent to convert to their own use, and retained, 127 Power Recovery Turbine Wheels, 262 Pistons, 27 Shields, 10 Gears, 50 Impeller Shafts, all having certain parts numbers and manufactured by Curtis-Wright, and which property having a value in excess of $100 had been stolen from the United States as the defendants well knew.

Count 41 charged that on or about July 8, 1965 appellant Wendt and defendant Clark sold 35 Power Recovery Turbine Wheels,

---

2/ R. T. refers to Reporter's Transcript.

bearing certain serial numbers listed, which property had a value in excess of $100 and as they knew had been stolen from the United States.

Count 46 charged that on or about August 27, 1965 appellant Wendt and defendant Clark sold 515 Pistons, with certain part numbers, which pistons were manufactured by Curtis-Wright, had a value in excess of $100, and had been stolen from the United States as they well knew.

Count 47 charged that from prior to December 1964, and continuing until on or about November 15, 1965, the defendants and appellant Wendt conspired together to commit offenses against the laws of the United States as follows: to receive, conceal and retain with intent to convert to their own use, property of the United States having a value in excess of $100, knowing that such property had been stolen or purloined from the United States. The purpose of the conspiracy was to obtain and sell the property listed in Counts 1 through 46, which property had been stolen from the Alameda Naval Air Station, Alameda, California. The conspiracy count goes on to list twenty-six overt acts. The appellant Wendt is named in overt acts number two, three, thirteen and twenty-six. Overt act number two charged that on or about April 1, 1965, defendant Clark had a conversation with appellant Wendt in Los Angeles. Number three charged that on or about June 25, 1965, in Los Angeles County, appellant Wendt paid defendant Gray $3,000. Number thirteen charged that on or about May 13, 1965 defendant Don C. Boone had a telephone conversation with appellant

Wendt. Number twenty-six charged that on or about April 20, 1965, in Los Angeles County, appellant Wendt gave defendant Nastali $5,000 in cash.

On March 7, 1966 all defendants appeared with counsel and pleaded not guilty [C. T. 52].

The jury was impaneled on May 2, 1966 [C. T. 62]. Trial was held from May 2 through 20, 1966 [C. T. 75].

On May 11, 1966 the Government rested and all defendants moved for judgment of acquittal [C. T. 67-68]. On May 12, 1966 the District Court granted a motion for judgment of acquittal as to appellant Wendt on Counts 13, 35, 36, 40 and 45 [C. T. 69].

On May 20, 1966 appellant Wendt was found guilty of Counts 12, 41, 46 and 47 [C. T. 57, 75].

On July 12, 1966 appellant Wendt was sentenced to the custody of the Attorney General for one year on each of the counts of which he was convicted, such sentences to run concurrently [C. T. 76-78].

Appellant Wendt filed a notice of appeal on August 1, 1966 [C. T. 80]. On August 29, 1966 the District Court ordered that the time for filing an appeal from the judgment be extended to include the late notice filed [C. T. 79].

The offenses occurred in the Southern District of California, Central Division. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 371 and 641. This Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 18, United States Code, Section 371 provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 641 provides:

"Whoever . . . steals, . . . or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any . . . thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

"Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted --

"Shall be fined not more than $10,000 or

imprisoned not more than ten years, or both; . . . ."

III

STATEMENT OF FACTS

The court instructed the jury that in order for the Government to meet its burden of proof on Counts 12, 41, and 46 of this case, it must establish four elements beyond a reasonable doubt. Those four elements are,

(1) that there was property of the United States which was stolen;

(2) that the defendant received, retained or sold such property with intent to convert it to his own use;

(3) that the defendant knew that the property was stolen from the United States;

(4) that the property had a value in excess of $100 [R. T. 1625-1627].

The appellant contends only that the Government failed to prove the third element.

"The crux of this case and the obvious tenor of the defense at the time of trial and indeed upon this appeal by the appellant WENDT is that:

"(a) There was insufficient evidence to show that WENDT knew the property was stolen; and

"(b) That he received, retained or conveyed the same with knowledge that it was in fact stolen from the United States." (A. B. pp. 34-35).

As the appellant does not contest that the aircraft parts designated in Counts 12, 41 and 46 of the indictment were property of the United States Government, were stolen from the Government, and had a value in each count of more than $100, the appellee will merely summarize the method of proof rather than proceed through an extensive cross-referencing of each of the aircraft parts to the numerous documents.

The testimony of Government witnesses established the following chain of title. The Government entered into contracts with Curtis-Wright Aircraft Corporation for the purchase of certain parts for the R-3350 aircraft engine. Mr. Elmer Sturm, Supervisor of the order division for Curtis-Wright, produced certain shipping documents. These shipping documents show the shipping of the type of parts charged in the indictment to the Alameda Naval Air Station [R. T. 23-37]. It was stipulated that these parts had been paid for by the Government and that the value of the parts in each count of the indictment was in excess of $100 [R. T. 36-37; 130-131].

The documents produced by Mr. Sturm contain identifying information as to Government contract number, part number, nomenclature, shipping date and quantities. For example, Government Exhibit Number 149A contains document Number G 215109.

This document reflects shipment of various parts, including 43 pistons, part No. 147986 to Alameda, California. Exhibit No. 40 is a box containing one piston, part No. 147986 [R. T. 46]. The stenciled information on Exhibit No. 40 shows packaging date of "10/2/63" and No. "43". All other information as to nomenclature, part number, government stock number, destination and date correspond with the information on Exhibit No. 149A. Thus, this piston was one of 43 pistons shipped from Curtis-Wright to Alameda Naval Air Station on document No. G 215109.

Mr. Sturm further testified that all the parts, with the exception of the PRT wheels, contain a part number. The part numbers are identical on each of the pistons, shields, and shafts made by Curtis-Wright. The PRT wheels, however, contain individual serial numbers. No two serial numbers on these PRT wheels are the same [R. T. 77-78].

Mr. Henry L. Ainlay, Jr., Control Division officer of the supply department at the U. S. Naval Air Station, Alameda, California, testified that the parts shipped by Curtis-Wright Corporation under documents in Government Exhibit No. 149A-B were received by the Alameda Naval Air Station [R. T. 141-149].

The Government produced Exhibit No. 77. This exhibit is a summary of inventories taken of Curtis-Wright parts at the Alemeda Naval Air Station in March, October and November of 1965 [R. T. 133-136]. This physical inventory is compared against a computerized record of the parts on hand [R. T. 193-195]. Exhibit No. 77 reflects that Alameda had shortages in all categories

of parts enumerated in the indictment. The shortages exceeded the quantities charged in the indictment.

Mr. William Verica was called as a witness. He was the disposal officer for the Aviation Supply office of the Department of Navy [R. T. 1513]. He controlled the disposal of surplus Navy aircraft parts throughout the world. He was given a list of all the parts mentioned in the indictment. He compared that list of parts, by part numbers, with those parts that the Navy has declared surplus in the two years previous to April 1965 [R. T. 1515-1538]. During that time three items were declared surplus. They were 22 carriers, 2,067 pinions, and 396 part No. 146888 [R. T. 1519-1520]. Wendt was not charged with receipt or sale of any of these parts.

During 1964 and 1965 Donald J. Nastali and Harold Steel Gray were partners in a business called Aero Service. Aero Service had offices in Burbank, California, and was engaged in the aircraft surplus ignition business [R. T. 296]. In December of 1964, Gray took a trip to the Oakland-San Francisco area [R. T. 294-295].

Gray entered into a dice game at the Oakland Inn and met a man named Tony Vierra. Vierra told Gray that he had some aircraft generators available and wished to sell them. Gray purchased the generators from Vierra and brought them back to Aero Service. Gray told Nastali that Vierra worked at the Alameda Naval Air Station and he believed that the generators came from the base. Gray thought the generators were stolen from Alameda

and Vierra had told Gray that he could get almost any Curtis-Wright parts Gray might want [R. T. 298].

James C. Clemons is a warehouseman at the Alameda Naval Air Station (hereinafter referred to as the "Alameda Facility) [R. T. 228-229]. On eight or ten occasions in 1965 he assisted in unlawfully removing aircraft parts from the Alameda Facility. He was given lists of part numbers to cross-reference through Navy manuals and locate the individual parts within the Alameda Facility [R. T. 233]. He would then place the parts on a pallet so they could be removed from the Facility [R. T. 234, 263-264].

The first time Clemons participated in this activity was in April of 1965. On that occasion Clemons and another employee, Butler, took parts from the Alameda Facility to a house in San Leandro owned by a man named Don Boone [R. T. 231-233]. There is a main gate at the Alameda Facility where people are checked in and out. On the occasion he and Butler took the parts through the gate they were not checked [R. T. 267].

Subsequent to this first transaction Clemons was present at three meetings off the base with Gray and Vierra. All three meetings took place at Mel's Bowling Alley. At the first meeting Gray asked Clemons about his job and whether he could cross-reference part numbers with Government stock numbers. Clemons replied that he could and Gray gave him a list of parts to locate. On the second two meetings Gray presented Clemons and Vierra with additional lists of part numbers [R. T. 234, 238-241].

Clemons helped locate these parts and set them aside for removal [R. T. 263-265].

On one occasion Clemons took 15 power recovery turbine wheels from the Alameda Facility to Gray at the Oakland Inn Motel [R. T. 241].

Clemons received $1600 for his role in removing parts from the Alameda Facility [R. T. 248].

One week after Gray returned with the generators he and Nastali decided they would attempt to obtain more parts from Vierra. Gray called Jim Boone at James G. Boone Company and asked him if he was interested in Curtis-Wright parts. Boone stated he was and Gray called Vierra and told him that he would purchase various parts from him [R. T. 299-301]. They borrowed some money and Gray drove up to Oakland, obtained the parts, and brought them back to Burbank. Gray and Nastali delivered these parts to Jim Boone [R. T. 302]. Gray made one or two more trips up to Oakland and obtained parts which he delivered to Jim Boone [R. T. 303-304, 414-415].

Gray telephoned Mace Clark [R. T. 305]. Clark was in the aircraft surplus parts business [R. T. 1419]. Gray asked Clark if he knew anyone who wanted to buy power recovery turbine (hereafter PRT) units at $250 apiece. The market value was approximately $1,500 to $2,000 each [R. T. 306]. Clark said he would inquire and a day later he came over to the Aero Service office. Clark, Gray and Nastali had a conversation about the PRT units and Clark asked "are these power recovery units stolen?" Gray

told Clark that "for $250 they have to be stolen" [R. T. 306]. Clark stated he knew a man who had been caught stealing property from the Navy and he did not want to get involved. Gray explained to him that the person from whom he was obtaining the parts in Northern California was working in conjunction with a man named Johnson who was in charge of the inventory cards on these specific parts. He explained further that when the parts were taken off the base, Johnson would take the inventory control cards and re-route the specific parts down through another base or pull the card out and rip it up; for these reasons there was very little chance of getting caught. Clark replied, "O. K., swell" and the agreement was made for the purchase of the parts.

Gray called Vierra who said he would need $2,500 in advance. Clark gave Gray a check for $2,500 and Gray went to Northern California and brought down the new shipment. The shipment was turned over to Clark [R. T. 307].

Gray made additional trips to Northern California. On one of the trips Gray needed someone to ride up to San Francisco and back in the truck. He asked Jim Coverdill if he would like to accompany him to San Francisco to pick up the parts [R. T. 314-315]. Coverdill accompanied Gray and when he returned from Northern California, went to work at Aero-Service.

Subsequently, Gray took a trip to Texas. While Gray was in Texas, Vierra called Nastali from San Francisco. Vierra said he had another load of parts that Gray had ordered [R. T. 316]. Nastali told Vierra that he would have to come up and pick up the

parts. Nastali and Coverdill drove a pick-up truck to the Oakland Airport where they met Vierra. Vierra took them over to a Mr. Johnson's house where they loaded the material in the back of the truck [R. T. 317]. Nastali and Coverdill drove the truck back to Burbank and unloaded all of the parts into the back of their shop. They locked the doors and had just finished sorting the parts when Clark arrived.

Clark looked at the various parts and asked Nastali who was going to purchase them. Nastali stated that they were probably going to be sold to Jim Boone. Clark stated that he would be interested in purchasing them and Nastali quoted him a price of $10,025. Clark said he didn't have the money at that time, but he knew someone else who did have the money [R. T. 318]. Clark left the shop and a short time later returned with appellant Wendt and introduced Wendt to Nastali. Wendt was engaged in the aircraft surplus parts business under the name Western Engine and Supply Company. He had had numerous dealings with the United States Government over the years [R. T. 1332-1335]. Wendt and Nastali discussed the purchase of various parts. Wendt agreed to buy all of the parts for $10,000. He said that he would need a couple of days to obtain the money. Wendt and Clark left the shop [R. T. 320].

Wendt returned on April 2, 1965 with $5,000. He wanted to give Nastali the money and take all the parts. Nastali told him to wait until Gray returned from Texas. On April 3, 1965, Gray, Nastali, Clark and Wendt met at Aero Service. Wendt offered to

pay $5,000 at that time and take immediate delivery of the PRT wheels. He would take the balance of the parts when he paid the remaining cash. This arrangement was agreed upon and the four men took the PRT wheels from the shop and loaded them in Wendt's 1963 T-Bird [R. T. 321, 1352].

After loading the car the four men went back into the shop. Wendt asked Gray how many more parts he could obtain. Gray responded, "quite a bit" and Wendt said to him that "All the material that you can come up with I can take it all." [R. T. 322]. Gray and Nastali then told Wendt "Well, you know this stuff is stolen to start with." Wendt replied that he did know that it was stolen but that it was not a problem because he could cover up for it. He said, "I just got through buying out an inventory in South America. I can tell people it came from there and if worse comes to worse I can always ship it back to South America to cover it back up and then ship it back here to cover it up." [R. T. 322, lines 12-18].

On April 9, 1965, Wendt paid Nastali $5,000, $2,000 in cash and a $3,000 check for the remainder of the parts. Nastali and Coverdill delivered the remainder of the parts to Wendt's house. The parts were put in his garage [R. T. 324, 1357].

The parts enumerated in Count 12 of the indictment are a portion of this first purchase. Wendt admitted in trial receiving the parts and later selling them to Air Motive, Incorporated and Harold Happe [R. T. 1358, 1362, 1364].

Count Thirteen of the indictment charged Wendt with selling

the parts obtained in this first purchase. He sold some of the PRT wheels to Air Motive, Incorporated. These wheels were not identified by serial number. Count 41 charged Wendt with selling thirty-five PRT wheels containing specific serial numbers. These wheels were sold to Air Motive, Incorporated. The court felt that there might be a duplication and dismissed Count 13 [R. T. 1091-1093, 1139].

Wendt made six other purchases from Gray and Nastali [R. T. 1360]. On these occasions Wendt would give Gray a list of the parts he wanted to purchase. Gray or Nastali would call Vierra and order the parts [R. T. 325]. Wendt would pay 50% of the purchase price in advance. He would make out a check to Gray and they would go to the bank and cash the check. Gray would take the money and fly to San Francisco. In San Francisco he would meet with Don Boone and Vierra. (Don Boone had been hired by Gray and Nastali to drive the parts down to Burbank.) Gray would pay Vierra, help Don Boone load up the parts, and then fly back to Burbank. Don Boone would haul the parts down to Burbank and he, Gray and Nastali would deliver them to Wendt's house. Wendt would then make out a check for the remaining 50% of the purchase price [R. T. 327-329].

Count 41 of the indictment charges that Wendt sold 35 PRT wheels and Count 46 charges that he sold 515 pistons. These PRT wheels and pistons were purchased by Wendt from Gray and Nastali as part of the last six transactions [R. T. 1360, 1368].

The 35 PRT wheels were sold to Air Motive, Incorporated

for $27,000. Wendt sold the wheels in one lot of 15 wheels on July 7, 1965 for $12,000 [R. T. 891] and one lot of 20 wheels on July 23, 1965 for $15,000 [R. T. 881-882; 889-890].

The 515 pistons were sold by Wendt to Air Motive, Incorporated on August 27, 1965 [R. T. 886-887]. Wendt purchased the pistons from Gray and Nastali at prices ranging from Twenty-five to Thirty dollars a piston. He sold them to Air Motive, Incorporated at $50 each for a total price of $25,750 [R. T. 886-887; 1367-1368].

During the course of the purchases Wendt had long distance telephone conversations with Gray, Nastali and Don Boone. They called Wendt from the San Francisco area [R. T. 352, 355, 364, 1575].

On May 17 or 18, 1965 Don Boone received a phone call from Clark. Clark asked Don Boone if he could obtain additional aircraft parts. Clark instructed Boone to call him when he had an answer. He told Boone "If I don't answer my partner Wendt will answer and leave the message with him." [R. T. 512]. Don Boone called Vierra and Vierra said he could obtain the parts. Boone called the phone number Clark had given him. Wendt answered the telephone. He told Wendt to inform Clark that he could get the parts. Wendt said "fine" and hung up [R. T. 564].

The next morning Clark flew up to San Francisco. He met Boone at the San Francisco Airport and they drove to Hayward. Clark told Boone that Wendt would fly up the following day with the money [R. T. 513].

The following day, May 21, 1965, Clark met Wendt at the San Francisco Airport. Wendt told Clark that he had trouble raising the $31,000. Wendt said he would try and obtain the money [R. T. 1438-1439]. Clark left Wendt and returned to San Leandro. At 1:00 that afternoon Clark met Don Boone at Bill's Bar in San Leandro, California. Shortly after 4:00 Wendt arrived at the Bar accompanied by Paul Long. Long represented Sky Parts, a surplus aircraft parts business located in San Leandro, California [R. T. 565]. Sky Parts was owned by Robert J. Dixon. Dixon and Wendt had a joint venture agreement whereby each of them would receive 50% of any profit on parts sold after the initial investment was returned [R. T. 957, 960]. Dixon had previously directly his banker to give Wendt cashiers checks in the amount of $31,000 [R. T. 953, 954].

The four men sat in the bar and discussed the sale of the parts. Wendt and Long negotiated with Boone [R. T. 1556]. Don Boone requested $28,000 for the parts [R. T. 567]. Long produced one Cashier's Check in the amount of $20,000 and another in the amount of $5,000. It was agreed that Boone would accept these checks at that time and Clark would pay him $3,000 at a later date [R. T. 567-568]. During the negotiations Long asked Boone if "there had been any trouble getting the items through the gate." Boone replied "No, it's already at my house. It's already there." Wendt stated "There had never been any problems in the past." [R. T. 515]. The four men left Bill's Bar and went to Don Boone's bank and cashed the checks. The money was placed in an envelope

and retained by Long [R. T. 569]. They then proceeded to Don Boone's house. The parts were in Boone's garage. Clemons had delivered them earlier that day [R. T. 530]. Long, Clark and Wendt inspected the parts and loaded them into a rented truck [R. T. 516, 571]. Long gave Boone the envelope containing the money and Long and Wendt left in the truck [R. T. 516].

In August of 1965 Wendt and Dixon purchased an additional $27,500 worth of Curtis-Wright parts from Aero Service [R. T. 957-963].

IV

ERRORS SPECIFIED BY APPELLANT

The appellant has specified the following points on appeal. 3/

1. The Trial Court erred in refusing to grant the motion of Appellant Emmet Walter Wendt for Judgment of Acquittal of the offenses charged in Counts 12, 41, 46 and 47 of the Indictment.

2. The evidence is insufficient as a matter of law to justify a finding of guilty as to Appellant Emmet Walter Wendt as to Counts 12, 41, 46 and 47 of the Indictment for the reason that there is no competent evidence to show that Appellant Wendt sold, received, concealed or retained any property with intent to convert it to his own use or gain knowing the same had been embezzled,

---

3/ Appellant's Opening Brief.

stolen or purloined from the United States of America.

V

ARGUMENT

A. THE TRIAL COURT PROPERLY APPLIED THE LAW IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON COUNTS 12, 41, 46 and 47.

At the close of the Government's case appellant made a motion for judgment of acquittal on all counts in which he was charged [R. T. 1120]. The court after considering all argument and evidence granted appellant's motion as to Counts 13, 35, 36, 40 and 45 [R. T. 1139, lines 3-5].

In ruling on a motion for judgment of acquittal the court must consider the evidence, and all inferences which can reasonably be drawn therefrom, in the light most favorable to the Government. If the evidence, viewed in this light, is sufficient to lead a reasonably minded jury to conclusion of the defendant's guilt beyond a reasonable doubt, the case must be submitted to the jury.

Schino v. United States, 209 F. 2d 67 (9th Cir. 1954);

Weaver v. United States, 374 F. 2d 878 (5th Cir. 1967);

Smith v. United States, 343 F. 2d 847 (6th Cir. 1965).

The thrust of appellant's motion was that the Government

had not met its burden of proving beyond a reasonable doubt that he knew the property was stolen from the United States Government [R. T. 1123-1125]. The court in colloquy with counsel questioned whether the appellant must know that the property was stolen from the United States Government [R. T. 1127]. Counsel then pointed out to the court the case of Souza v. United States, 304 F. 2d 274 (9th Cir. 1962). A paragraph from the opinion was read to the court:

> "MR. ROGAN: Your Honor, may I interrupt and cite you a case which has that kind of language in it?
>
> "THE COURT: Yes, if you have got a case on that.
>
> "MR. ROGAN: Just while you bring up that point, that's the case of Sousa against the United States.
>
> "MR. BARNETT: I gave that to the Court.
>
> "MR. JOHNSON: I will agree, Your Honor, You see --
>
> "MR. ROGAN: Excuse me, Mr. Johnson. Let me read this one paragraph from the Sousa case. 'Not only was the jury instructed but the prosecution was required to prove beyond a reasonable doubt that the property described in Counts 2, 3 and 4 was property of the United States; that the same was sold or conveyed by appellant without

authority and that each sale or conveyance was made by appellant with knowledge on his part of ownership of the property by the United States but also with knowledge that the property had been stolen from the United States.'

"MR. JOHNSON: That was my understanding of the law, Judge.

"THE COURT: That seems to bear out your statement." [R. T. 1127, line 13 to 1128, line 14].

Whatever the Court's view of the law prior to the discussion of the Souza case, he came to the conclusion that it was a necessary element of the Government's case to prove the appellant's knowledge that the property was stolen from the United States. His reply to counsel, "That seems to bear out your statement" would so indicate [R. T. 1128, lines 13-14]. Also in subsequent discussions with counsel, the court referred to the element of "from whom the property was stolen." [R. T. 1131]. Finally, the court instructed the jury that knowledge that the property was stolen and that it was stolen from the United States were necessary elements for the Government to prove beyond a reasonable doubt.

"Now, four essential elements are required to be proved beyond a reasonable doubt in order to establish the offenses set forth in those counts in the indictment alleging a receipt of stolen property, and those elements are these:

"1. that property of the United States specified in each of these counts was in fact stolen;

"2. that the defendant received such property and retained it with the intent to convert it to his own use;

"3. that the time the defendant received and retained such property he did so willingly and with knowledge that the property was stolen from the United States;

"4. that such property had a value exceeding $100."

[R. T. 1626].

Likewise the court informed the jury that there were also four necessary elements which they must find beyond a reasonable doubt in order to find one of the defendants guilty of unauthorized sale of government property. He again pointed out to the jury that they must not only find that the property sold was property of the United States but that at the time the defendant sold the property they knew it was stolen from the United States [R. T. 1626].

These instructions are a correct statement of the law.

Souza v. United States, 304 F. 2d 274 (9th Cir. 1962);

Findley v. United States, 362 F. 2d 921 (10th Cir. 1966).

The court properly applied the law to the evidence in denying

appellant's motion for judgment of acquittal. The evidence is reviewed in the following argument.

B. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT.

The appellant argues that the evidence is not sufficient to prove he knew the aircraft parts were stolen from the United States Government. As the Government cannot look into the mind of the appellant it is required to meet this burden of proving appellant's state of mind by circumstantial evidence. The evidence in this case clearly supports the trier of facts determination that appellant had this knowledge.

Appellant had a conversation with Clark regarding the purchase of aircraft parts on April 1, 1965. Clark and appellant proceeded to Aero Service where they met with Nasatali [R. T. 317-319]. Appellant and Nasatali discussed the purchase of the parts. The parts were in the back of the shop. They were new and scarce. The Navy had not declared them surplus for the past two years. They were currently being used in Viet Nam [R. T. 107, 1515-1520]. They were contained in unopened and sealed Curtis-Wright boxes. The boxes had government contract numbers and descriptions stenciled on them [R. T. 37, 39, Exhibits 36-75]. Appellant had dealt with United States Government parts in the past [R. T. 1334]. Appellant agreed to purchase all the parts for $10,000 [R. T. 320].

On April 2, 1965 appellant returned to Aero Service. He purchased the PRT wheels for $5,000. They were loaded in the trunk of his car [R. T. 321]. Appellant went back into the shop. He said he would purchase all of the parts Gray and Nastali could obtain. He said he knew the parts were stolen. Nastali testified:

> "So we turned around there and we said, 'Well, you know this stuff is stolen to start with,' and Mr. Wendt says 'yes'. He says, 'Yeh, but there is no problem.' He says, 'I can cover up for this material being here.' He says, 'Well, how' -- Mr. Wendt says, 'Well, I've got -- I just got through buying out an inventory in South America.' And if he did or not, I don't know. An airline inventory.
>
> "He says, 'I can tell people it came from there and if worst comes to worst,' he said, 'I can always ship it back to South America to cover it back up and then ship it back here to cover it up." [R. T. 322].

Appellant made six other purchases from Gray and Nastali [R. T. 1360]. He gave Gray a list of parts he wanted [R. T. 325, 1360]. Gray informed appellant he could obtain the parts and appellant gave Gray 50% of the purchase price in advance. Gray flew up to San Francisco-Oakland area [R. T. 327 - 329]. Appellant had telephone conversation with Gray while Gray was in the San

Francisco area [R. T. 352, 355]. Gray returned to Burbank with the parts appellant had ordered.

Appellant purchased the parts at a low price [R. T. 306]. He purchased PRT wheels for $300 apiece and promptly resold them for approximately $770 apiece [R. T. 320, 890-891]. Similarly, he bought pistons for $25 apiece and resold them for $50 apiece [R. T. 886-887, 1367-1368].

In May of 1965, appellant and Clark began dealing directly with Boone in San Francisco. Appellant flew to San Francisco. He had a meeting at Bill's Bar in San Leandro with Boone, Clark and Long [R. T. 567-568]. San Leandro is near the Alameda Naval Air Station. The Alameda Naval Air Station had a main gate with a guard [R. T. 267]. During conversation in the bar appellant stated that there had never been any problem getting the parts through the gate in the past [R. T. 515]. Appellant and Long then took delivery of parts that were stored in a garage in San Leandro [R. T. 516, 530].

Appellant sold two other lots of parts in the San Francisco area [R. T. 928-930, 957-963]. He sold 10 new PRT wheels to Mr. Nielsen of Aircraft Engine Sales, Inc. Appellant told Nielsen he obtained the wheels from a Mr. Happe [R. T. 929]. Mr. Happe did not sell appellant any Curtis-Wright R-3350 parts in 1965 [R. T. 1565].

Viewing this evidence and all inferences which may reasonably be drawn therefrom in the light most favorable to the Government, the evidence was sufficient to support the verdict of guilty.

Noto v. United States, 367 U.S. 290 (1961);

Byrne v. United States, 327 F.2d 825 (9th Cir. 1964);

Mosco v. United States, 301 F.2d 180 (9th Cir. 1962).

VI

CONCLUSION

For the reasons stated above the judgment of the District Court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROGER A. BROWNING,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Roger A. Browning
ROGER A. BROWNING

NO. 21564

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMMET WALTER WENDT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S MOTION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

BARRY TARLOW
9601 Wilshire Boulevard
Beverly Hills, Calif. 90212

Attorney for Appellant.

NO. 21564

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMMET WALTER WENDT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S MOTION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

BARRY TARLOW
9601 Wilshire Boulevard
Beverly Hills, Calif. 90212

Attorney for Appellant.

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 21564

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMMET WALTER WENDT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S MOTION FOR REHEARING

I

JURISDICTIONAL STATEMENT

On May 9, 1968, this Court affirmed the judgment of the trial court in the above-entitled case. Appellant is now moving for a rehearing in this matter.

II

STATEMENT OF FACTS

During the questioning of an agent of the Federal Bureau of Investigation by the Government prosecutor a conversation with appellant was introduced in which appellant refused to discuss the case based on the advice of his attorney. (R. T. pp. 660-661) 1/

This testimony was admitted without objection.

1/ R. T. refers to Reporter's Transcript of Court Proceedings.

It is possible that the Government prosecutor in his closing argument commented on appellant's refusal to speak with the FBI agent. (See Affidavit of Barry Tarlow in Support of Motion for Extension of Time in Which to File Motion for Rehearing.) The closing argument by the Assistant United States Attorney was not even prepared as part of the record of this appeal. (R.T. p. 1607).

Appellant's trial attorney, who also represented him on appeal, did not raise any issue on appeal concerning the use by the Government of appellant's refusal to discuss the case with an FBI agent.

III

ARGUMENT

A. IT IS REVERSIBLE ERROR FOR THE GOVERNMENT TO PRESENT TESTIMONY THAT APPELLANT EXERCISED HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS.

The record reveals that there are approximately 33 lines of testimony concerning appellant's reluctance to discuss the case. (R.T. pp. 660-661).

The jury in this case was informed that appellant had "said that his attorney had told him that he shouldn't discuss the matter further unless his attorney was present," (R.T. p. 660, 1. 14-16) and that "he felt obliged to follow his attorney's advice." (R.T. pp. 660-661).

The only purpose of this testimony is to create in the minds of the jury the impression that appellant is guilty or has something to hide and therefore his attorney has advised him to remain silent.

In Baker v. United States, 357 Fed. 2d 11 (5th Cir. 1966) the Court reversed a judgment in a similar case.

> "In asking for counsel before making any statement appellant was exercising a constitutional right which the Supreme Court has time and again declared to be guaranteed to all persons accused of crime. To have proven that appellant requested the right of counsel and thereafter made no further statement was we feel as objectionable as it would have been to comment on defendant's exercising his constitutional right not to take the witness stand." Baker, supra, at p. 13.

In Fagundes v. United States, 340 Fed. 2d 673 (1st Cir. 1965) the Court stated that:

> "His assertion of one constitutional right, his right to counsel, and his reliance upon another constitutional right, his right to remain silent when charged with crime, we think cannot be used against him substantively as an admission of guilt, for to do so would be to render the constitutional rights mere empty formalities devoid of practical substance....
>
> "...we think it reversible error to permit a jury to draw any inference adverse to one accused of crime from his reliance upon his constitutional right to silence and to the advice of counsel." Fagundes, supra, p. 677.

B. THIS CASE INVOLVES PLAIN ERROR UNDER RULE 52(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND OBJECTION AT THE TRIAL LEVEL WAS UNNECESSARY.

It is obvious that this error is plainly prejudicial. See State v. Smith, 420 P. 2d 278 (Supreme Court of Arizona). It must be remembered that appellant's defense in this case was that he was a law-abiding businessman and was not involved in any criminal conduct. The question which would then be asked by any juror would be, would an honest businessman refuse to talk to an FBI agent on the advice of his attorney? The answer, at least to a layman, would certainly be no, he would not.

C. IF APPELLANT'S TRIAL AND APPELLATE COUNSEL IS DEEMED TO HAVE WAIVED APPELLANT'S CONSTITUTIONAL OBJECTIONS TO THE EVIDENCE IN QUESTION, THE APPELLANT MAY NOT BE BOUND BY THE WAIVER SINCE HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Both at the trial level and on appeal appellant's attorney has a duty to familiarize himself with the law of the case. If substantial error is involved in this case the fact that it was not brought to the attention of the Court either at the trial level or on appeal it is strong evidence that appellant has been denied the effective assistance of counsel. Stem v. Turner, 370 Fed. 2d 895, 900 (4th Cir. 1966). In Coles v. Peyton, 389 Fed. 2d 224, 226, (4th Cir. 1968) the Court held that "counsel must conduct appropriate investigations both factual and legal." It seems that at the trial

level counsel was not aware of the legal problem involved in this motion for rehearing. Whatever justifications can be advanced for his conduct at the trial level, he certainly should have discovered this problem if "appropriate legal investigation" had been made prior to the hearing of this appeal.

IV

CONCLUSION

For the reasons stated above a rehearing should be granted in this matter.

Respectfully submitted,

BARRY TARLOW

Attorney for Appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and, that in my opinion, the foregoing brief is in full compliance with those rules. I further certify that in my judgment this Appellant's Motion for rehearing is well founded and that it is not interposed for delay.

/s/ Barry Tarlow
BARRY TARLOW